92-1617

No. _____

Supreme Court, U.S.
APR 5 1993

In The

Supreme Court of the United States

October Term, 1992

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

DON B. MILLER
Counsel of Record
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, CO 80302
(303) 447-8760

JAY BENDER
BAKER, BARWICK, RAVENEL AND BENDER
1730 Main Street
Columbia, SC 29201
(803) 799-9091

ROBERT M. JONES
123 Workman Street
Rock Hill, SC 29730
(803) 324-2988

RICHARD STEELE
1563 Harbor View Road
Charleston, SC 29422
(803) 795-0021

CHERYL PERKINS
1517 Gregg Street
Columbia, SC 29201
(803) 771-1554

April, 1993

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

136 pp

QUESTIONS PRESENTED

1) Where Federal agents contracted to protect the Catawba Tribe's land claim in return for the Tribe's agreement to relieve the Government of financial obligations, and the contract was not repudiated by the Government until 1985; did the Court of Appeals err in holding that the Tribe's 1990 breach-of-contract suit against the Government was barred by the Tucker Act's six-year statute of limitations?

2) Did the Court of Appeals err in holding that the statute of limitations required the Tribe to bring suit against the Government long before the Tribe had suffered damages and before the extent of injury could possibly be determined?

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit entered on January 6, 1993.

OPINIONS BELOW

On August 20, 1991, the United States Court of Federal Claims granted the Government's motion to dismiss under USCC Rule 12(b)(1). *Catawba Indian Tribe of South Carolina v. U.S.*, 24 Cl.Ct. 24 (1991) (Appendix B at 21a). The Court of Appeals affirmed. *Catawba Indian Tribe of South Carolina v. U.S.*, 982 F.2d 1564 (Fed.Cir. 1993) (Appendix A at 1a).[1]

JURISDICTION

The Court of Appeals entered the judgment sought to be reviewed on January 6, 1993. This Court has jurisdiction to review the final decision of the Court of Appeals under 28 U.S.C. § 1254(1) (1976).

[1] This Court's prior decision in a related case, South Carolina v. Catawba Indian Tribe, 476 U.S. 498 (1986) (holding that state statutes of limitations applied to petitioner's possessory land claim as a result of the 1959 Catawba Tribe of South Carolina: Division of Assets Act, 25 U.S.C. §§ 931-938 (the 1959 termination act)), is included herein as Appendix D at 70a.

STATUTE TO BE CONSTRUED

The decision below construes 28 U.S.C. § 2501 (1988) which provides:

> Every claim of which the United States Claims Court has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

STATEMENT OF THE CASE

This is an action by an Indian tribe for money damages against the United States. Jurisdiction in the Court of Federal Claims is conferred by 28 U.S.C. §§ 1491 and 1505. The Tribe's principal claim against the United States is based upon the Government's breach of an implied-in-fact contract to protect the Tribe's claim to possession of 144,000 acres of land that were reserved by the Tribe in treaties with the Crown.[2]

A. Nature Of The Claim.

In 1960, authorized Federal agents made a bargain with the Catawba Tribe. If the Tribe would agree to release the Government from financial and management

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[2] The facts relevant to the possessory land claim, including the establishment of the 1763 Treaty Reservation, the Tribe's illegal dispossession by the State of South Carolina in 1840, and the eventual establishment of Federal supervision in 1943 are set forth in the Court's majority and dissenting opinions in South Carolina v. Catawba Indian Tribe, 476 U.S. 498 (1986) (Appendix D at 86a) and in the Tribe's complaint in this case. (Appendix C at 39a).

obligations it had undertaken in a 1943 agreement with the Tribe, the Government would protect the Tribe's land claim. This was a tacit understanding between the Government and the Tribe that is demonstrated by the conduct of the parties and the surrounding circumstances.[3]

The Government's 1960 promise was not qualified in any way. The Government did not say, and the Tribe did not agree, that the land claim would continue to be viable for only a certain period, after which the claim could be destroyed if the Tribe took no action. The parties understood that the claim would be protected. This contract implied-in-fact required the Government to either file a protective suit on the Tribe's behalf or, at the very least, notify the Tribe that the Tribe would have to act on its own to protect the claim because it might now be subject to harm as a result of the passage of time.

But the Government took no action to protect the land claim. The Government did not file the claim on the Tribe's behalf. It waited until 1985 to notify the Tribe that it would not act to protect the claim, and that, in the Government's view, the claim had not been protected from the passage of time since the termination act became effective in 1962. In 1986, this Court ruled that the 1959

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[3] Congress had required that tribal consent be obtained by providing in the 1959 termination act that the act would not become effective until a majority of the adult members subsequently agreed. 25 U.S.C. § 931. Congress had been informed of Federal agents' pre-1959-Act assurances to the Tribe that the claim would not be jeopardized and of the Tribe's formal resolution expressly conditioning its consent to termination on the status of the land claim being unaffected.

Act resulted in the application of state statutes of limitations to the Tribe's claim.[4] In 1992, the Court of Appeals for the Fourth Circuit affirmed the dismissal of thousands of acres from the claim based upon possession adverse to the Tribe since the effective date of the termination act in 1962. In this case, the Tribe seeks indemnification from the United States for the value of that portion of the Tribe's possessory claim that is barred as a result of the running of the state statute of limitations.

B. Statement Of Facts

In 1953, only ten years after the Government had contracted with the Tribe and the State to provide Federal services to the Catawba Tribe, Complaint ¶ 16y (Appendix C at 51a), Congress drastically altered the course of Federal Indian policy. House Concurrent Resolution No. 108 declared the Congressional policy of terminating the Federal trust relationship with Indian tribes. Pursuant to

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[4] This Court stated in 1986 that it perceived no contradiction between the applicability of the state statute of limitations and the Government's pre-1959-Act assurance that the status of the claim would be unaffected by the 1959 Act. South Carolina v. Catawba Indian Tribe, *supra*, 476 U.S. at 510. This Court rejected the argument that the 1959 Act extinguished the land claim and "*assume[d]* that the status of the claim remained exactly the same immediately before and immediately after the effective date of the Act, but that the Tribe thereafter had an obligation to proceed to assert its claim in a timely manner. . . . " *Id.* (emphasis added). This Court assumed that the obligation to bring suit was the Tribe's, but whether the Government had contractually undertaken a post-1959-Act obligation to bring suit on the Tribe's behalf, or otherwise protect the claim, was not before this Court in 1986.

that policy, the Government in 1954 identified the Catawba Tribe as a likely candidate for termination. *South Carolina v. Catawba Indian Tribe*, 476 U.S. at 503.

In 1958, in recognition of the disastrous effects termination was having on Indian people, Congress and the Eisenhower Administration modified the termination policy. The Government rejected coercive termination of Indian tribes in favor of a policy that permitted termination based only on informed tribal consent. Complaint ¶ 20 (Appendix C at 52a). *See* F. Cohen, *Handbook of Federal Indian Law* 182 (1982 ed.).

Shortly thereafter, the Department of the Interior (Interior) dispatched Special Agent Raymond Bitney to the Catawba Tribe for the purpose of securing tribal consent to termination of federal supervision. Complaint ¶ 28 (Appendix C at 54a). The Federal Government had failed to provide services and funding under the 1943 Memorandum of Understanding. As a result, the Tribe was unable to provide housing or productively utilize its restricted federal reservation lands, and tribal dissatisfaction was running high. Complaint ¶ 25 (Appendix C at 53a).

Federal officials played on this dissatisfaction to garner tribal support for the termination proposal. They told the Tribe that while they were powerless to provide additional services, they could facilitate a removal of federal restrictions from the federal reservation. This would result in the Indians acquiring unrestricted fee title which they could then mortgage and thereby secure the funds to improve their housing and to finance farming operations. *Id.*

Agent Bitney pressed Interior's case for termination to the Indians in a door-to-door, family-by-family campaign during the last quarter of 1958. Complaint ¶ 27 (Appendix C at 53a). His reports contain a detailed narrative of the issues discussed at each visit. They show that during these meetings several tribal officials expressed concern about the Tribe's land claim against the State. One tribal official stated that Interior's plan could not go forward until the land claim was resolved. Agent Bitney assured them that the land claim would in no way be jeopardized by Interior's proposal to withdraw federal supervision. Complaint ¶ 27 (Appendix C at 53a).

The Tribe's resolution, drafted by Agent Bitney, expressly conditioned the Tribe's support for the legislation on there being nothing in the legislation impairing the status of the Tribe's land claim. Complaint ¶ 30 (Appendix C at 54a). After the Tribe adopted the resolution, Interior sent it to Congressman Hemphill. The Congressman returned it to Interior, requesting assistance in drafting a bill "to accomplish the desire [of the Tribe] set forth in the resolution." Complaint ¶¶ 30, 31 (Appendix C at 54a, 55a).

The Congressman and Interior officials thereafter presented the bill to the Tribe, which at no time in the process was represented by counsel. At a March 28, 1959 tribal meeting, they read the bill line by line to the Tribe and assured them that it had been drafted to carry out the intent of the tribal resolution. Complaint ¶¶ 22, 34 (Appendix C at 52a, 55a). According to its official minutes of the meetings, the Tribe understood the draft legislation to be a "contract that was drawn up by the Bureau of

Indian Affairs." It approved the "contract" at the March 28, 1959 meeting. *Id.*

Representative Hemphill's introductory remarks emphasized to Congress that the Tribe's consent was contained in the January 3, 1959 resolution. 105 *Cong. Rec.* 5462 (1959). At the subcommittee hearings on the bill, the Congressman and Interior officials emphasized that the bill had been drafted to conform to the desires of the Tribe as expressed in the January 3, 1959 resolution. Congress took note of the January 3 and March 28 endorsements of the bill by the Tribe. H.R. Rep. No. 910, 86th Cong., 1st Sess.; *reprinted in* 1959 U.S.C.C.A.N. 2671, 2672; Complaint ¶¶ 39, 40 (Appendix C at 57a).

Presumably to ensure that the Federal policy of informed tribal consent was implemented, Congress amended the bill to provide that it would not become effective until a majority of the adult members of the Tribe agreed to accept the division of assets in accordance with the Act's provisions. With that important exception, Congress enacted the same bill that had been read line by line to the Tribe.

The termination act became law on September 21, 1959. Once again Government agents were dispatched to the Tribe to secure the consent required by Congress. Federal agents secured the agreement of tribal members by assuring them that their land claim would be protected. Complaint ¶ 44 (Appendix C at 58a). By June 30, 1960, Government agents had collected enough signatures to permit Interior to announce that the Tribe had

accepted termination. Pursuant to the Act, Interior distributed the 3,434 acres acquired in 1943 and liquidated other tribal assets. On July 1, 1962, the Secretary of the Interior formally decreed that termination of the Catawba Tribe was final. Complaint ¶¶ 41, 42 (Appendix C at 58a).

In 1977, in a formal litigation request to the Department of Justice, the Solicitor of the Department of the Interior concluded that: 1) the Catawba Tribe had been dispossessed of its treaty reservation in violation of Federal law; 2) the 1840 state treaty was void; 3) the Tribe could establish a *prima facie* case for repossession of its reservation under the Nonintercourse Act; 4) "the United States has had a duty under the Non-intercourse Act, since the Treaty claim accrued in 1840, to take action to protect the Catawba's rightful ownership of the 1763 reservation;" and 5) "*this duty was not affected by the 1959 Act.*" Complaint ¶ 52 (Appendix C at 60a) (emphasis added). "The litigation request was later withdrawn in an effort to emphasize that the Interior Department favored a negotiated settlement if at all possible. . . . " *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 518 (1986) (Justice Blackmun, dissenting).[5] Thereafter, efforts to legislatively settle the claim failed. *Id.*

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[5] On March 31, 1983, the Secretary of the Interior included the damages portion of the Catawba Tribe's land claim on the list of potentially meritorious Indian claims to be investigated by the Department of the Interior pursuant to 28 U.S.C. § 2415 (1982). 48 Fed.Reg. 13920 (1983). Interior's inclusion of the claim on the § 2415 list meant that § 2415's Federal statute of limitations would not begin to run on the claim until the Department formally notified the Tribe that it would not pursue the claim on the Tribe's behalf. The Catawba land claim remains on the § 2415 list.

In 1980, the Tribe filed an ejectment action in Federal District Court seeking to recover possession of its treaty reservation based on its unextinguished, recognized Indian title. In 1983, the district court dismissed the claim based on the 1959 Act, concluding, among other things, that the Act resulted in the application of state statutes of limitations to the Tribe's claim and that they operated to bar the claim in its entirety. The Court of Appeals for the Fourth Circuit reversed, holding that the 1959 Act did not extinguish the claim nor had state law become applicable to the claim as a result of the Act. Because it held state law inapplicable to the claim, the Court of Appeals did not decide what effect South Carolina statutes of limitations would have on the claim. *Catawba Indian Tribe v. State of S.C.*, 718 F.2d 1291 (4th Cir. 1983), *aff'd en banc* 740 F.2d 305 (4th Cir. 1984) (*Catawba I*).

The State petitioned this Court for a Writ of Certiorari. This Court requested the views of the Solicitor General. In May 1985, the Department of Justice, overruling Interior's views, urged this Court to grant *certiorari* and reverse the Court of Appeals on the grounds that the 1959 termination act had resulted in the application of state statutes of limitations to the Tribe's land claim. This was the first notification received by the Tribe that the Government would not take action to protect the claim and believed that the claim had been unprotected since 1962.

This Court granted *certiorari* and reversed in 1986. Reviewing the single issue of whether the 1959 Act applied state statutes of limitations to the Tribe's Federal cause of action, this Court, in a 6-to-3 decision, determined that the statute's plain language compelled the

application of state law limitations periods to the claim. *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498 (1986). The case was remanded to the Court of Appeals to determine the effect of state law limitations on the Tribe's claim.

In 1989, the Court of Appeals ruled that South Carolina's 10-year statute of limitations would operate to bar the Tribe's claim to those lands where the claimant could prove adverse possession for a continuous 10-year period between 1962, when the termination act became effective, and 1980, when the Tribe filed suit. Because tacking successive periods of adverse possession to meet the 10-year statutory period is not permitted by South Carolina law, the Tribe's claim would not be barred as to lands not continuously possessed adversely for 10 years. *Catawba Indian Tribe v. State of S.C.*, 865 F.2d 1444 r(4th Cir. 1989), *cert. denied*, 491 U.S. 906 (1989) (*Catawba II*).

On remand, the district court, on July 19, 1990, found numerous defendants' evidentiary showings to be sufficient to prove adverse possession for 10 years. It then dismissed the Tribe's claims to parcels totaling 10 to 20% of the 1763 Treaty Reservation. On the Tribe's appeal, the Court of Appeals for the Fourth Circuit affirmed in part, reversed in part, and vacated and remanded in part. *Catawba Indian Tribe v. South Carolina*, 978 F.2d 1334 (4th Cir. 1992) (*en banc*), *cert. denied*, 61 U.S.L.W. 3620 (U.S. Mar. 8, 1993) (No. 92-1088) (*Catawba III*).

In 1990, within six years of the Government's 1985 notice, this Court's 1986 decision that state statutes of limitations applied, and the Fourth Circuit's decision in

Catawba II that some portion of the Tribe's claim would be barred, the Tribe filed suit against the United States.

REASONS FOR GRANTING THE WRIT

A. The Question Presented Is One Of Extreme Importance.

In *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 505 (1986), this Court granted the State of South Carolina's petition "because of the importance of the case." Holding that state statutes of limitations applied to the Tribe's claim, this Court observed that the Government's pre-1959-Act assurances that the claim would not be jeopardized by termination were not inconsistent with the application of state statutes of limitations. In dissent, Justice Blackmun, joined by Justices O'Connor and Marshall, observed that:

> Today's decision seriously handicaps the Catawbas' effort to obtain even partial redress for the illegal expropriation of lands twice pledged to them, and it does so by attributing to Congress, in effect, an unarticulated intent to trick the Indians a century after the property changed hands. From my perspective, there is little to be proud of here.
>
> Because I do not believe that Congress in 1959 expressed an unambiguous desire to encumber the Catawbas' claim to their 18th-century treaty lands, and because I agree with Justice Black that "[g]reat nations, like great men, should keep their word," . . . I do not join the judgment of the Court.

Id. at 529 (citation omitted).

At the very core of this case is the very important question whether this great nation will keep its word to a small, unrepresented Indian Tribe that relied in good faith on its bargain with the Government. Whether the United States fulfills its contractual obligations is always a matter of importance. But where a case involves contractual obligations incurred in the exercise of Congress' plenary power over Indian affairs that affect the very survival of valuable treaty property rights, the issues assume special importance. As this Court noted over 50 years ago, in dealing with treaty obligations to Indians, the United States "has charged itself with moral obligations of the highest responsibility and trust." *Seminole Nation v. United States*, 316 U.S. 286, 297 (1941).

And it cannot rightly be said that these contractual obligations are of lesser importance in this case because they were undertaken in the course of terminating Federal supervision of the Catawba Tribe. Congress plainly intended that the Tribe benefit from the 1959 Act and that its property rights be protected. The lower court's decision in this case, holding that the six-year statute of limitations begins to run in favor of the Government long before the existence of an injury or the amount of damages could possibly be determined, has broad implications for the administration of Indian affairs and the accountability of the Government to its Indian beneficiaries.

In 1985, in a case where the Catawba Tribe was seeking redress in a manner consistent with the assurances of the Government, this Court recognized the

importance of the issue and granted review. Today, this case is no less important simply because the rights of third-party landowners are not at stake. The Court of Appeals' ruling results in manifest injustice to the Catawba Indian Tribe by permitting the Government to remain wholly unaccountable for its breach of contract. The Government benefited from its bargain with the Catawba Tribe, and the Tribe should not be denied at least an opportunity to have its claim heard.[6]

The issues presented are of paramount importance to the Catawba Tribe, to Indian tribes generally, and to the administration of Indian affairs.

B. The Court of Appeals' Decision Conflicts with this Court's Settled Doctrine that a Claimant Need Not Resort to Premature or Piecemeal Litigation, and Conflicts with the Rationale of this Court's Prior Decision in *South Carolina v. Catawba Indian Tribe*.

The Court of Appeals erroneously held that the Tribe was required to file suit against the Government within six years of the effective date of the termination act, *i.e.*, by July 1, 1968. *Catawba Indian Tribe of South Carolina v. U.S.*, 982 F.2d 1564, 1571 (Fed.Cir. 1993). Alternatively, the lower court held that the Tribe's suit had to be filed by

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[6] The facts alleged in the Tribe's complaint must be taken as true and "[i]f these facts reveal any possible basis on which the [Tribe] might prevail, the motion must be denied." W.R. Cooper Gen. Contractor, Inc. v. United States, 843 F.2d 1362, 1364 (Fed.Cir. 1988); Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). Because the facts in this case reveal a strong basis for recovery, the lower court erred in denying the Tribe an opportunity to offer evidence to support its claim.

July 1, 1978 at the latest, that date being six years after the first of the adverse possessors perfected title against the Tribe. *Id.*

1. ***The Tribe could not have maintained suit in 1968 because it had suffered no injury at that time.***

In holding that the Tribe's claim against the Government accrued in 1962, the Federal Circuit ignored the Court of Claims' long-standing principle that "[i]t is too well established to require citation of authority that a claim does not accrue until the claimant has suffered damages." *Terteling v. United States*, 167 Ct.Cl. 331, 338, 334 F.2d 250, 254 (1964); *United States v. Dickinson*, 331 U.S. 745 (1947).

In this case, the Catawba Tribe could not possibly have brought suit in 1968. Before 1972, the Tribe had no conceivable claim against the Government because no portion of its third-party land claim had even arguably been barred. *Catawba II*, *supra*, 865 F.2d at 1456. That the mere application of state law was not an actionable injury is established by this Court's 1986 statement that there was no contradiction between the application of state statutes of limitations and Government assurances that the status of the land claim would not be affected. *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 510 (1986).

The lower court misunderstood the very nature of the Tribe's claim. The actionable injury in this case is not the application of state law. Rather, it is the Government's breach of its agreement to protect a claim that had become subject to state law in return for the Tribe's

consent to termination. As a result of this misunderstanding, the lower court failed altogether to consider the Tribe's breach of implied-in-fact-contract claim. The opinion below contains no analysis relevant to the Government's post-1959-Act obligation to bring suit on the Tribe's behalf or to repudiate its bargain in a timely fashion so that the Tribe itself might act to protect its claim.

2. ***After 1972, the Tribe was not required to bring suit against the Government until the third-party possessory claim was resolved because it would have risked* res judicata *and there was no conceivable way to determine the amount of damages so that a final account could be struck with the Government.***

Although the principles of *United States v. Dickinson*, 331 U.S. 745 (1947) control the analysis of post-1972 accrual, they were ignored by the lower court. *Dickinson* establishes that where the risk of *res judicata* exists and the existence and extent of damages are uncertain as a result of circumstances controlled and methods chosen by the Government, the claimant need not resort to piecemeal or premature litigation. Suit may properly be postponed until the consequences of the Government's action "have so manifested themselves that a final account may be struck." *Id.* at 749.

The lower court failed to consider the Tribe's argument that any suit brought against the United States prior to resolution of the third-party possessory claim would have subjected the Tribe to the risks of *res judicata*. If the Tribe had brought suit in 1977, the Government would

have defended the suit on the grounds that the 1959 Act did not extinguish the land claim or subject it to state law time bars, *i.e.*, that the Government had fulfilled its contractual and trust obligations by fully protecting the land claim. That was the Government's official position from 1977 to 1985. Had the Government prevailed in such a suit,[7] and had the Tribe then pursued its possessory claim against the third-party possessors of the land, the third-party defendants in the possessory claim would not have been bound by the Court of Claims' ruling that the 1959 Act had no effect on the Tribe's land claim. *Hansberry v. Lee*, 311 U.S. 32 (1940). If the federal district court in the possessory claim had then ruled in the defendants' favor and held, contrary to the Court of Claims, that the 1959 Act did in fact extinguish or limit the possessory claim, then the Tribe would have been barred by *res judicata* from again pursuing its breach of contract and trust claims against the Government.

In addition, the lower court's alternative holding that the claim accrued in 1972 when the 10-year adverse possession period ran on some parcels requires the Tribe to bring suit before damages could possibly be determined so that a final account could be struck. The Federal Circuit's analysis failed to consider that South Carolina's 10-year statute operates as an affirmative defense. Under

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[7] In 1967, the Court of Claims had held in similar circumstances in Menominee Tribe of Indians v. United States, 179 Ct.Cl. 496, 388 F.2d 998 (1967), *aff'd*, Menominee Tribe v. United States, 391 U.S. 404 (1968), that the Menominee Termination Act's general application of state law to that tribe did not subject the Menominee's treaty right to hunt and fish to the application of state law.

South Carolina law, legal title to the disputed lands is held by the Tribe and as a result the Tribe is entitled to a presumption of possession. The third-party claimants' actual possession is deemed to be in subordination to the legal title unless and until each claimant proves, by clear and convincing evidence, open, hostile, notorious, continuous, and exclusive possession for 10 years without tacking. *Catawba II, supra.*

In circumstances where: a) a claimant waives his affirmative defense; or, b) land has been unoccupied; or, c) land has been possessed for less than 10 continuous years without tacking between 1962 and 1980; or, d) an adverse claimant fails to prove the character and duration of his possession by clear and convincing evidence; legal title will remain in the Tribe. Thus, with respect to that parcel of land, the Tribe's possessory claim would remain viable and the Tribe would have suffered no damage as a result of the Government's breach of contract. *Catawba II, supra; Catawba III, supra.*

Plainly, such a fact-based determination of rights between the Tribe and third-parties could not take place in a Court of Claims suit between the Tribe and the Government. After 1972, final resolution of the third-party possessory claim became a prerequisite to fixing the Tribe's damages so "that a final account may be struck." *United States v. Dickinson, supra,* 331 U.S. at 749. This principle was applied by the Court of Claims to the implied-in-fact-contract claim in *Terteling*: "*Dickinson* . . . teaches us that these contractors had the right to wait until their full obligations were ascertainable before bringing suit therefor." Key to this analysis is the fact,

relied on heavily in *Dickinson* and *Terteling*, that the Government controlled the circumstances and chose the method that created the uncertainty. In such a situation, this Court recognized the unfairness of placing on the claimant the onus of determining the decisive moment when the fact of injury could no longer be in controversy. *Dickinson, supra* at 747-49.

The lower court ignored the rationale of *Dickinson* and *Terteling* and failed altogether to consider the uncertainty faced by the Tribe as a result of the Government's choice of methods.[8] In holding that the claim in *Terteling*

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[8] While the lower court charged the Tribe with knowledge in 1962 of the effects of the 1959 Act, South Carolina v. Catawba Indian Tribe was a case of first impression. The effect of a termination act on a Nonintercourse Act land claim had not previously been before the courts and its resolution was certainly not clearly foreshadowed. An *en banc* Court of Appeals for the Fourth Circuit ruled in 1984 that the 1959 Act did not apply state law to the claim, Catawba Indian Tribe v. South Carolina, 740 F.2d 305 (4th Cir. 1984), and three dissenting Supreme Court Justices likewise believed that Congress intended to leave the Catawba's land claim wholly exempt from the 1959 Act's general application of state law. Indeed, "[p]rior to [the Supreme Court's decision in] *Catawba*, the federal courts had not held a Nonintercourse claim susceptible to a state law time bar." Note, *South Carolina v. Catawba Indian Tribe: Terminating Federal Protection with "Plain" Statements*, 72 Iowa L. Rev. 1117, 1122 (1987), *citing* Clinton and Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 Me. L. Rev. 17 (1979). Nor had the federal courts ever held that unextinguished treaty rights or undistributed *tribal* property, as distinguished from the distributed property of individual Indians, were subject to application of state law, even when considering the effect of termination legislation on such rights and property. *See*, Menominee Tribe v. United States, 391 U.S. 404 (1968); Kimball v.

accrued "only when the litigation ended [and] the contractors could determine the total amount of the litigation expenses . . . ," *i.e.*, when the Supreme Court denied *certiorari*, *id*, 334 F.2d at 254, the *Terteling* court relied heavily on the fact that while the Government action that gave rise to the injury may have been lawful, the Government had a choice of methods of fulfilling its contract to furnish gravel pit sites. Had it chosen a more certain method, the injury to the contractors "would probably not have resulted," *id*. But the Government chose a method that created uncertainty. The contractors took action in reliance on the contract implied-in-fact and the Government was held to bear the risk that damages would occur as a result of the Government's choice of methods. *See Juda v. United States*, 6 Cl.Ct. 441, 451 (1984) ("The doctrine announced in *Dickinson* and elaborated by the Court of Claims in a variety of factual contexts has application to the facts of this case," alleging contract implied-in-fact imposing fiduciary obligations). Because the Government had control of and chose the method of carrying out its obligations to protect the claim, the principle of *Dickinson* applies in this case to permit suit to be postponed until damages have been suffered and their amount can be fixed. As long as the Tribe reasonably continued to rely on the Government's assurances, the Government would stand in the role of an indemnifier under its contract implied-in-fact for whatever damages the Tribe suffered as a result of the Government's breach.

Callahan, 493 F.2d 564 (9th Cir.), *cert. denied* 419 U.S. 1019 (1974); Note, *Terminating Federal Protection with "Plain" Statements*, *supra*.

The Government's ability to fulfill its contractual duty by simply notifying the Tribe that its claim might be subject to harm as a result of the passage of time ceased in 1972, when the shortest of the state statutes of limitations arguably became applicable. Before 1972, the Government could have simply notified the Tribe and, regardless of whether the Tribe actually brought suit, the Government would have been discharged of any liability. After 1972, any repudiation by the Government of the 1960 bargain would have required the Tribe to file suit not against the Government, but against the third-party possessors of the land in order to mitigate damages.

While the Tribe might have maintained suit against the Government after July 1, 1972, *Dickinson* makes it plain that the Tribe was not required to bring suit at that time and thereby face the risk of *res judicata* and the uncertainty of the damage. *Id.*, 331 U.S. at 749. Resolution of the third-party possessory claim had become a prerequisite to determining both the existence and amount of damages so that a final account could be struck. While the Government might lessen the amount of its exposure by repudiating its agreement with the Tribe sooner rather than later, it could no longer totally avoid the risk that its actions, or failure to act, might result in extinguishment of a portion or all of the Tribe's title. And, as long as the Tribe's continued reliance on its contract with the Government was reasonable, that risk was the Government's to bear under its contract implied-in-fact.

Until the Government's 1985 *amicus curiae* brief notified the Tribe that the Government had not and would not act to protect the claim, the Tribe's reliance on its 1960 contract with the Government was reasonable. In 1959,

after the bill applying state law was drafted, the Government led the Tribe to believe that application of State law would not impair its claim in any way. In 1960, Government agents secured the Congressionally-mandated tribal consent in return for assurances that the claim would be protected. The Government had affirmatively undertaken both the duty of protecting the claim and the role of advising its unrepresented beneficiary and gave no notice or indication that its actions, or failure to act, might harm that which it had promised to protect.

In 1977, the Interior Solicitor expressly affirmed the Government's duty to protect the claim and recommended that the Government fulfill its obligation to protect the claim by bringing suit on the Tribe's behalf. In 1983, Interior placed the damages portion of the Tribe's land claim on the list of claims against which the applicable federal statute of limitations would not begin to run until the Government notified the Tribe that it would not pursue the claim on the Tribe's behalf. The Solicitor's 1977 conclusion that the Government had a duty to protect the claim remained the official position of the United States until the Justice Department overruled Interior in 1985 and informed this Court that it believed that the 1959 Act had resulted in the application of state statutes of limitations to the Tribe's claim.[9]

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[9] In 1980, notwithstanding that the Tribe's litigation request was still pending with the Department of the Interior and that the Government's official position continued to be that the claim was fully protected, the Tribe for its own reasons filed its third-party land claim. The effect of this filing was to mitigate damages against the Government well in advance of the Government's belated 1985 notice repudiating its 1960 bargain.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that this Court issue a Writ of Certiorari and review the erroneous judgment of the court below.

Dated this 6th day of April, 1993.

Respectfully submitted,

DON B. MILLER
Counsel of Record
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, CO 80302
(303) 447-8760

JAY BENDER
BAKER, BARWICK,
RAVENEL AND BENDER
1730 Main Street
Columbia, SC 29201
(803) 799-9091

ROBERT M. JONES
123 Workman Street
Rock Hill, SC 29730
(803) 324-2988

RICHARD STEELE
1563 Harbor View Road
Charleston, SC 29422
(803) 795-0021

CHERYL PERKINS
1517 Gregg Street
Columbia, SC 29201
(803) 771-1554

APPENDIX A

The CATAWBA INDIAN TRIBE of SOUTH CAROLINA, Plaintiff-Appellant,

v.

The UNITED STATES, Defendant-Appellee.

No. 92-5018.

United States Court of Appeals, Federal Circuit.

Jan. 6, 1993.

Don B. Miller, Native American Rights Fund, Boulder, CO, argued, for plaintiff-appellant.

Katherine L. Adams, Environment and Natural Resources Div., Dept. of Justice, DC, argued, for defendant-appellee. With her on the brief were Miles E. Flint, Deputy Asst. Atty. Gen., J. Carol Williams and Andrew M. Eschen, Attorneys.

Before MAYER, MICHEL, and PLAGER, Circuit Judges.

PLAGER, Circuit Judge.

In this case, the Catawba Indian Tribe (the Tribe) alleges a series of wrongful acts by the United States Government which, the Tribe contends, caused substantial financial harm to the Tribe through the loss of some, if not all, of their ancestral lands.

After having failed in its effort to recover the actual lands themselves,[1] the Tribe now asks compensation for

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[1] *See South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 106 S.Ct. 2039, 90 L.Ed.2d 490 (1986), *on remand*, 865 F.2d

the loss, and, on the basis of the Tucker Act, seeks the aid of the United States Claims Court[2] in obtaining that compensation. The Claims Court, on the grounds that the relevant statutes of limitations have run against the Tribe's claim, dismissed the suit. *Catawba Indian Tribe v. United States*, 24 Cl.Ct. 24 (1991). The only question before us is whether the Claims Court was correct in so ruling. We hold it was and therefore affirm.

I. BACKGROUND

A.

While some would view the origins of this case to be the era when European adventurers came upon the vast North American continent and the peoples whose home it was, the legal issues in this case date from 1763. In that year the King of England conveyed to the Catawba Tribe, then occupying areas of what later became North and South Carolina, a 15 square mile tract, about 144,000 acres, to be their ancestral home.[3] The Tribe subsequently

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1444 (4th Cir.), *cert. denied*, 491 U.S. 906, 109 S.Ct. 3190, 105 L.Ed.2d 699 (1989).

[2] The Claims Court was renamed the Court of Federal Claims on October 29, 1992. Federal Courts Administration Act of 1992, Pub.L. No. 102-572, § 902(a), 106 Stat. 4506 (1992).

[3] The historical facts in this case are of record and largely undisputed. We need not set them out in full here, since they are given in considerable detail in the several prior opinions that have been written in this litigation, including the majority and dissenting opinions in the Supreme Court. *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 106 S.Ct. 2039. We sketch them here only to put in context the specific events that the Tribe claims as the basis for this suit.

occupied that tract, now wholly within the boundaries of South Carolina.

The Tribe alleges that when the United States was formed, it succeeded to the position of the grantor, with all that entails. Over the years the United States did assume a trustee relationship with the various Native American tribes, including the Catawbas. In that capacity the Government undertook a number of actions intended to assist Native American tribes in their efforts to accommodate to the influx of others into the country.

One of these efforts took the form of an act known as the Nonintercourse Act. Under the terms of the earliest version of the Nonintercourse Act, effective in 1790, (now codified as re-enacted and amended at 25 U.S.C. § 177 (1988)), transfers of title to Native American lands were prohibited unless pursuant to a treaty approved by the United States.

Despite this law, and without approval from the United States, the State of South Carolina in 1840 negotiated with the Tribe an agreement – known as the Treaty of Nation Ford – under which the Tribe conveyed its entire 144,000 acres of ancestral lands to the State for $16,000 and a promise that it would be given a new reservation somewhere in the State as its tribal land.[4] Over the years the State conveyed that original 144,000 acre tract into private ownership, and title to it is now in some 27,000 different owners.

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[4] The record reflects that the State, after some years, eventually provided the Tribe a 630 acre parcel at considerably less cost to the State than had been agreed.

In 1940, the Federal Government undertook tripartite negotiations with the Tribe and South Carolina. South Carolina sought a release and quit-claim from the Tribe in exchange for its participation in a joint rehabilitation program. The Federal Government doubted the legality of this exchange and refused to agree. Then in 1943, the parties signed a Memorandum of Understanding which transferred to the Federal Government 3,434 acres to hold in trust for the Tribe. The Federal Government agreed to provide additional services, and the Tribe adopted a constitution. However, under the agreement the historic land claim remained intact, and unresolved.

In the 1950's, Congress decided to terminate the Government's trustee relationship with the various Native American tribes. A series of acts ensued, known as the Termination Acts. It was the manner in which the Termination Act applicable to the Catawba Tribe was negotiated and executed that gives rise to many of the Tribe's claims in this litigation.

B.

The Tribe alleges that in 1958-59 a representative of the Bureau of Indian Affairs (BIA), on behalf of the Federal Government, undertook negotiations with the surviving members of the Tribe looking to an agreement under which the Government's trustee relationship to the Tribe would be ended, the Tribe and its members would be released from any special relationship to the Government, and the Government would no longer have responsibility for the well-being of the Tribe. During the course

of these negotiations, the Tribe reasserted its long-standing grievance involving its ancestral lands. The Tribe alleges that it was assured that the termination of the Government's trusteeship would not affect its rights under that claim.

Subsequently, with the cooperation of the Tribe, a draft act was prepared and submitted to Congress. On September 21, 1959, the Catawba Indian Tribe Division of Assets Act, now codified at 25 U.S.C. §§ 931-938 (1988) (the Termination Act or Act), was enacted. Following affirmation by the Tribe members, as provided by the Act, the Termination Act became effective by declaration of the Secretary of the Interior on July 1, 1962.

Section 5 of the Act, now codified at 25 U.S.C. § 935, contains the following provision:

> The constitution of the tribe . . . shall be revoked by the Secretary. Thereafter, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, *and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction.* (Emphasis added).

The meaning and effect of this particular section of the Act, and especially the emphasized language, is a central issue in the current dispute over ownership of the lands in question, the dispute which gave rise to this action.

In 1980 suit was brought in the Federal District Court of South Carolina on behalf of the Catawba Tribe against

various private landowners, claiming ownership in the Tribe of the original ancestral lands. The specific parcels involved were among those that had long ago been conveyed by the State into private ownership. The landowners responded that, even if the Treaty of Nation Ford was invalid, as alleged, section 5 of the Termination Act made the Tribe subject to all State laws, including the South Carolina law on adverse possession. Under the State's law, any landowner who could prove ten years continuous adverse possession would be entitled to keep the land, even against the true owner.

The Tribe responded that, in view of the specific understandings with the Federal Government that accompanied the drafting and enactment of the Termination Act concerning the preservation of their historic claim, the Act could not have been intended to, and did not, have that effect. The District Court ruled in favor of the landowners in 1983.

On appeal to the Fourth Circuit, that court reversed, holding that ambiguous statutes affecting the Tribe should not be construed to their prejudice, and accordingly, the ambiguous phrasing of section 5 must be construed to exclude any congressional intent to adversely affect the Tribe's land claim. The Fourth Circuit held that the provision was intended only to end federal supervision and assistance. *Catawba Indian Tribe v. South Carolina,* 718 F.2d 1291, 1296-97 (4th Cir.1983), *adopted en banc,* 740 F.2d 305 (4th Cir.1984).

The Supreme Court granted certiorari and reversed the Fourth Circuit. The Court held that the Termination Act provision applied in all respects, and that the Tribe's

claim to its land was subject to any adverse possession rights which may have accrued under South Carolina law. *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 106 S.Ct. 2039, 90 L.Ed.2d 490 (1986). On remand to the Fourth Circuit, that court held that adverse possession for ten continuous years subsequent to July 1, 1962 would bar the Tribe's claims against individual possessors. 865 F.2d 1444 (4th Cir.), *cert. denied*, 491 U.S. 906, 109 S.Ct. 3190, 105 L.Ed.2d 699 (1989). Subsequently the District Court, on July 19, 1990, dismissed the Tribe's claims to parcels totalling about 75% of the original acreage. *See* 24 Cl.Ct. at 28.

C.

Stymied in its efforts to regain its ancestral lands, the Tribe in 1990 turned to the Claims Court for relief under a new theory. The Tribe proffers seven claims upon which its argues monetary relief from the United States should be granted. Claims 1 and 2 allege breach of fiduciary duty based on the Government's permitting South Carolina to acquire the original lands, and subsequent failure to investigate and restore the Tribe to possession.

Claim 3 alleges a continuing breach of fiduciary duty to protect the viability of the Tribe's land claim, based, *inter alia*, upon the Government's conduct and affirmative acts before, during, and after the enactment of the Termination Act. The Tribe alleges that as part of the approval action by the Tribe, the Tribe was assured that nothing in the Termination Act would affect the Tribe's claim to its ancestral lands.

These alleged Governmental assurances turned out to be wrong, and form the basis for the Tribe's claim that the Government failed to protect the Tribe's land claim by a breach of a duty to notify the Tribe of the effect of the 1959 Termination Act (claim 4), breach of an implied-in-fact contract that the ensuing losses the Tribe sustained would not happen (claim 5),[5] and a Fifth Amendment taking of a vested property right – the *claim* to the land, rather than the land itself (claim 6).[6]

Finally, since much of the 144,000 acre tract is now permanently in possession of others pursuant to the State adverse possession provisions and the decisions in *South Carolina v. Catawba Indian Tribe, supra* note 1, the Tribe alleges that the Government has failed to distribute those specific assets to the Tribe in accordance with the Termination Act provision, 25 U.S.C. § 933, constituting a breach of a continuing duty to quiet title and distribute

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[5] At oral argument before this court, the Government contended that the Supreme Court implicitly dealt with the issue of whether an implied-in-fact contract arose as a result of the negotiations related to the enactment of the Termination Act, and in effect determined that no such contract existed. Counsel for the Tribe, who argued the case in the Supreme Court, responded to a question with the statement that the issue of whether a contract arose was never raised or considered by the Court. While a close reading of the Supreme Court's opinions rendered in this matter supports the Tribe's view of the matter, in view of the manner of disposition of the case it is unnecessary for us to resolve this question.

[6] For purposes of this analysis, we assume that this *claim* for the historic lands is a property interest in the nature of a chose in action, and could be subject to 'taking' by the government under the Fifth Amendment. *See generally, Hendler v. United States*, 952 F.2d 1364 (Fed.Cir.1991).

assets under the terms of the 1959 Termination Act (claim 7).

The United States moved for dismissal of the Tribe's claims on the grounds that whatever wrongful acts there may have been, any remedy available under the Tucker Act is barred because the Tribe waited too long to sue. The Claims Court dismissed all seven claims as barred by the Indian Claims Commission Act (ICCA) five-year statute of limitations, or alternatively by the six-year statute of limitations of the Tucker Act. In reviewing the propriety of this dismissal, we take as true the facts alleged by the Tribe in its complaint. *W.R. Cooper General Contractor, Inc. v. United States*, 843 F.2d 1362, 1364 (Fed.Cir.1988).

At oral argument the Tribe conceded, as it must, that any causes of action which accrued before 1946 were indeed barred by failure to have brought them before the Indian Claims Commission during the five year window provided under the ICCA, discussed in more detail below. But, the Tribe argues, there were a series of post-1946 events between the Tribe and the Government that constituted wrongs by the Government that are not barred by the ICCA. The only issue before us then is whether the alleged wrongs arising from these later actions are barred on the grounds that this suit, filed on June 21, 1990, was filed later than the six years allowed under the Tucker Act after the causes of action first accrued.

II. DISCUSSION

A.

As an initial matter, we address the Government's argument that the Claims Court correctly held that the

ICCA bars all seven of the above-described claims. The ICCA states:

> The Commission shall receive claims for a period of five years after August 13, 1946, and no claim existing before that date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by Congress.

25 U.S.C. § 70k (1988).

The Government asserts that all seven of the Tribe's claims may be understood to be one single 'claim' within the meaning of the statute, because "all of the Tribe's claims stem from one basic contention – namely, that the Government had an obligation to protect the Tribe from the effects of the 1840 Treaty of Nation Ford, and it failed to do so." Because that 'claim' existed before August 13, 1946, it is now wholly barred by the ICCA. This is too broad a reading of the Tribe's claims.

The Tribe's claims are grounded upon three separate bases – claims 1 and 2 upon the government's historical failure to restore the Tribe to ownership of its land; claims 3-6 upon the misrepresentations regarding the legal effect of section 5 of the Termination Act, 25 U.S.C. § 935; and claim 7 upon the obligations imposed on the Government by the Termination Act itself. While all seven claims may stem at some general level from the allegations of a unitary disregard by the Government for the Tribe's land claim, this is not enough to have brought claims 3-7 under ICC jurisdiction.

The three groupings of claims depend on different facts which occurred at different times. Indeed, the facts which led to claims 3-7 could hardly have been anticipated in 1946 or within the five year statutory period thereafter (by 1951), since the Federal Government did not announce its policy of terminating its trust relationships until 1953.

The Tribe concedes that 'historical' claims should have been brought by the 1951 deadline. Thus claims 1 and 2 are properly held to be barred by the ICCA, since these claims essentially reside in the Government's alleged ongoing failure to restore to the Tribe the *land* at issue. However, both the Government and the Claims Court err in equating the Government's passive failure to act to restore the land with the Government's alleged active representations that the Termination Act, effective in 1962, would not affect the Tribe's historic claim to the land.

B.

1.

Claims 3 through 6 (we address claim 7 separately, *infra* Part C) are not barred by the ICCA. The question remains whether, as the government contends, they are barred by the Tucker Act six-year statute of limitations, 28 U.S.C. § 2501 (1988).[7]

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[7] Claim 3 is not explicitly limited to conduct and affirmative acts in relation to the passage of the Termination Act. However, any claim based on historical acts relating to the loss of the ancestral land (or any other act occurring prior to August 13,

The text of this provision reads "[e]very claim of which the United States Claims Court has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."

Claims 3 through 6 stem from the Government's alleged assurances that the land claim would be preserved despite the enactment of the Termination Act. As we know, it was not. The initial question is, when did the cause of action underlying these claims "first accrue" so as to begin the running of the Tucker Act statute of limitations? Suit was filed under the Tucker Act on June 21, 1990; the statute of limitations under the Act is six years. In order not to be barred, the underlying cause of action must have first accrued on or after June 21, 1984.

It is hornbook law that a claim does not accrue until all events necessary to fix the liability of the defendant have occurred – when "the plaintiff has a legal right to maintain his or her action." Corman, *Limitation of Actions*, § 6.1, p. 374 (1991). *See also Nager Electric Co. v. United States*, 368 F.2d 847, 851 (Ct.Cl.1966) (" 'First accrual' has usually been put, in broad formulation, as the time when all events have occurred to fix the Government's alleged liability, entitling the claimant to demand payment and sue here for his money.") The Tribe takes the position that the underlying cause of action did not accrue until the Tribe was 'damaged', because 'damage' was an event necessary to fix the Government's liability. The Tribe argues that it was not 'damaged' until it was clear that

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1946) is barred by the ICCA. Accordingly, we limit our discussion of Claim 3 to conduct and affirmative acts associated with the passage of the Termination Act.

the Government's assurances about the legal effect of section 5 (to the effect that the historic claim had been protected from application of South Carolina law) were incorrect and that losses to the Tribe would ensue.[8] It was not clear, says the Tribe, that this was the consequence of the 1962 Termination Act until the Supreme Court so announced in 1986. Thus the cause of action accrued in 1986 and is not barred.

The difficulty with the Tribe's argument, creative though it is, is that it is contrary to one of the fundamental premises of our legal system. The argument assumes that the adverse effect of the 1962 Act did not become operative against the Tribe – the Tribe was not 'damaged' – until the Supreme Court some 25 years later so construed the Act. While the Supreme Court's pronouncement in 1986 might be relevant to fixing the time when the Tribe *subjectively* first knew what the Act meant, it is fundamental jurisprudence that the Act's *objective* meaning and effect were fixed when the Act was adopted. Any later judicial pronouncements simply explain, but do not create, the operative effect. *See, e.g., Chevron U.S.A., Inc. v. United States,* 923 F.2d 830, 834 (Fed.Cir. 1991), *Ide v. United States,* 25 Ct.Cl. 401, 408 (1890), *aff'd,* 150 U.S. 517,

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[8] *See United States v. Dickinson,* 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed. 1789 (1947) (inverse condemnation action based on gradual flooding of plaintiff's land), *Terteling v. United States,* 334 F.2d 250 (Ct.Cl.1964) (suit seeking reimbursement for litigation costs), and *Illinois v. United States,* 15 Cl.Ct. 399 (1988) (state sued in Claims Court for reimbursement for emergency repair expenditures which were incurred during pendant District Court liability dispute amongst municipal, state, and federal entities).

14 S.Ct. 188, 37 L.Ed. 1166 (1893), *and Jones v. United States*, 6 Cl.Ct. 531, 532-33 (1984). *See also Menominee Tribe of Indians v. United States*, 726 F.2d 718, 720-21 (Fed.Cir.), *cert. denied*, 469 U.S. 826, 105 S.Ct. 106, 83 L.Ed.2d 50 (1984) ("28 U.S.C. § 2501 is not tolled by the Indians' ignorance of their *legal* rights."), *and Dion v. United States*, 137 Ct.Cl. 166 (1956) (suit for damages flowing from government's alleged refusal to recognize plaintiff's civil service status was time-barred; "ignorance of one's legal rights does not toll the statute of limitations.").

This conclusion is reinforced in this case by the Supreme Court's explicit holding that the statute was unambiguous on its face. *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. at 506, 106 S.Ct. at 2044. Whether the harm was caused to the Tribe by the Act itself or by Government misrepresentations about what the effect of the Act might be, the 'damage' was done when the Act became effective in 1962. At that time, possessors of the tribal lands holding under deeds from the State of South Carolina could begin to acquire adverse possession rights against the Tribe. The Government's duty to act, either affirmatively or by way of disclaimer, arose. Any suit based on the theories presented necessarily would have to have been filed by July 1, 1968.

Even if a different view is taken as to when the Tribe was irrevocably damaged, that it was 1972 – the *end* rather than the beginning of the ten year adverse possession period under South Carolina law – when the first of the adverse possessors perfected title, suit should have been filed by July 1, 1978 at the latest. Under either view, the fact that the existence of this legal harm was not finally adjudicated until the Supreme Court opinion in

1986 is not determinative of the basic question of when the injury to the Tribe occurred.

2.

Statutes of limitations sometimes expressly provide that under specified circumstances the running of the statute is suspended, or tolled.[9] Even if there is no express tolling provision applicable, courts may when circumstances require invoke the concept of tolling as an equitable matter.[10] As was explained in *Japanese War Notes Claimants Ass'n v. United States:*

> In certain circumstances the running of the statute will be suspended when an accrual date has

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[9] The statute here at issue is tolled for "a person under legal disability or beyond the seas at the time the claim accrues. . . ." Section 2501. No argument is made that this tolling provision is applicable to the facts of this case.

[10] The concurring opinion of Judge Mayer states that the question of equitable tolling was not raised by either party, and that the discussion thus is a gratuitous offering of the court. We do not agree. A central issue in the case, as framed by appellant, is "whether the Claims Court erred in holding that the Tribe's claims are barred by the six-year limitations period contained in 28 U.S.C. § 2501." A court in an appropriate case may temper the application of the bar in exercise of its equitable powers. *See Irwin v. Veterans Admin.*, 498 U.S. 89, ___ 111 S.Ct. 453, 457, 112 L.Ed.2d 435 (1990). Under the circumstances of this case we would be remiss not to have considered all aspects of the issue presented by appellant. *Cf.* 5A C. Wright and A. Miller, *Federal Practice and Procedure*, § 1357, 336-37 (1990) ("The complaint should not be dismissed merely because plaintiff's allegations do not support the legal theory he intends to proceed on, since the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory.")

> been ascertained, but plaintiff does not know of his claim. Ignorance of rights which should be known is not enough. . . . Plaintiff must either show that defendant has concealed its acts with the result that plaintiff was unaware of their existence, or it must show that its injury was "inherently unknowable" at the accrual date.

373 F.2d 356, 358-59 (Ct.Cl.), *cert. denied*, 389 U.S. 971, 88 S.Ct. 466, 19 L.Ed.2d 461 (1967) (citations omitted). *Accord, Menominee Tribe of Indians v. United States*, 726 F.2d 718, 721 (Fed.Cir.) *cert. denied*, 469 U.S. 826, 105 S.Ct. 106, 83 L.Ed.2d 50 (1984); *cf. Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed.Cir.1988).

The Supreme Court recently has confirmed that equitable tolling is available in suits against the United States:

> Once Congress has made such a waiver [of sovereign immunity permitting suit to be brought against the Government within a specified time], we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver. . . . We therefore hold that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States.

Irwin v. Veterans Admin., 498 U.S. 89, ___, 111 S.Ct. 453, 457, 112 L.Ed.2d 435 (1990) (citing *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 79 S.Ct. 760, 3 L.Ed.2d 770 (1959)).

As noted a traditional ground for equitable tolling of a statute of limitations is based on the avoidance of

penalizing a plaintiff simply because under the circumstances plaintiff did not and could not have known of the *facts* upon which the claim is based. *See* Corman, *Limitation of Actions*, § 11.1 (1991). Particularly is this the case when the facts necessary to know of the harm were intentionally withheld from the plaintiff by the defendant. *Id.* at § 9.7. But in the case before us, all the relevant *facts* were known. It was the meaning of the law that was misunderstood.

But let us put that distinction aside for the moment and assume, as the Tribe would have it, that their ignorance of the import of the law was grounds for equitable tolling. Let us assume further that the Tribe, despite the Supreme Court's pronouncement that the language of Section 5 was unambiguous, could not reasonably have known the import from the language itself. The question that then arises is, when was the earliest that the Tribe could reasonably be said to know, or should have known, that the Termination Act would be used against it in its efforts to reacquire its ancestral lands?

Up until 1980 it could be argued on these assumptions that the Tribe had no reason to believe that its understanding of the Termination Act (that the provisions did not affect its land claims) was incorrect. There is support for this. In 1977 the Solicitor of the Department of the Interior opined that the Act operated prospectively only, and did not affect pre-existing rights. *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. at 517-18, 106 S.Ct. at 2049-50.

But in 1980, when the Tribe brought its title claims in the South Carolina District Court, the landowners raised

as a defense the applicability of the state adverse possession law. The district court held that defense valid. At that point, the Tribe was fully on notice that the Government's earlier legal representations were subject to question, and could well be erroneous. Thus, even on the assumptions we have made about the Tribe initially not knowing or not having reason to know that the Government's representations regarding the legal effect of section 5 were wrong, the causes of action should have been sued upon at the latest by 1989, six years after the district court decision dismissing the Tribe's claim.

Under any of the above scenarios, when suit was filed in 1990, the six year statutory period for filing had run against these claims. The Government invoked the bar of the statute, as it was entitled under the law to do; the Claims Court correctly ruled that claims 3-6 must be dismissed.

C.

Claim 7 speaks of a continuing duty of the United States "to quiet title to the lands of the 1763 Treaty reservation in the Tribe and distribute the proceeds among the members of the Tribe." This duty is premised upon the provision in the Termination Act, § 933, obligating the Government to distribute tribal assets. Under that provision, the Government had the duty to distribute to the Tribe all assets *"held in trust by the United States"* for the benefit of the Tribe, 25 U.S.C. § 932 (emphasis added).

If Claim 7 is understood to include a continuing duty that arose prior to the Termination Act, that part of the claim is little more than a restatement of the historical

duty of Claim 2, considered *supra*. If, on the other hand, the claim alleges an obligation under the Termination Act on the part of the Government to distribute to the Tribe *all* lands to which the Tribe had an historical claim, and not merely those lands then actually in the control of the Government, the breach of that duty would not have occurred until after the effective date of the Termination Act. The question then is, when subsequently did the cause of action accrue for the alleged breach?

The breach of the Government's duty would have been evident in the way in which the Government implemented the Act. The Tribe's claim arguably accrued when the division of tribal assets was completed as part of the Termination Act process without inclusion of the ancestral lands. Alternatively, it accrued shortly thereafter – under the Termination Act, any "tribal asset" which was "not sold within two years from the date of the notice [of agreement to division of tribal assets published in the Federal Register]" was to be conveyed to a "trustee." 25 U.S.C. § 933(f). That notice was published in the Federal Register on July 1, 1962.

If the Government had viewed the land within the historical claim as a tribal asset, it would have been required to convey that land to a trustee. Since the Government failed to take *any* action regarding the historical lands, the Tribe had notice as of July 1, 1964 either that the Government did not consider those lands to be "tribal assets," or that the Government intentionally refused to convey them to a trustee. Under either interpretation the statute of limitations ran at the latest on July 1, 1970, for this claim.

In suits against the Federal Government, the Government has reserved the right to specify the terms of the law under which such suits may be brought. If that law does not permit an alleged wrong to be righted through a judicial remedy, the remedy must lie with Congress.

CONCLUSION

The Claims Court dismissed all seven of the Tribe's claims. The Claims Court was correct in its dismissal since all seven claims are time-barred. Accordingly, the Claims Court judgment is affirmed.

COSTS

No costs.

AFFIRMED.

MAYOR, Circuit Judge, concurring in the judgment.

I would affirm on the basis that all seven claims are barred by the statute of limitations, 28 U.S.C. § 2501. Accordingly, discussion of any other bases is unnecessary, and I do not subscribe to it. Equitable tolling was not raised by any party to this litigation, and is a gratuitous offering by the court, which I decline to join.

APPENDIX B

The CATAWBA INDIAN TRIBE
OF SOUTH CAROLINA

v.

The UNITED STATES.

No. 90-553L.

United States Claims Court.

Aug. 20, 1991.

Don B. Miller, Boulder, Colorado, attorney of record for plaintiff. Jay Bender, Robert M. Jones, Richard Steele, of counsel.

Andrew M. Eschen, Washington, D.C., with whom was Assistant Attorney General Richard B. Stewart, for defendant.

OPINION

YOCK, *Judge*.

Plaintiff, the Catawba Indian Tribe of South Carolina, seeks recovery for damages arising from the government's breach of alleged fiduciary duties. This case is before the Court on defendant's motion to dismiss on the grounds that the complaint is not within the jurisdiction of this court. For the reasons stated herein, the defendant's motion is granted, and the complaint will be dismissed.

Facts

In 1760 and 1763, Great Britain negotiated treaties with plaintiff, the Catawba Indian Tribe of South Carolina (Tribe). As a result of these treaties, a 144,000-acre tract of land was set aside as a reservation for the Tribe. Later, when the United States achieved independence from Great Britain, it became invested with all of the former sovereign's rights and obligations under the 1760 and 1763 treaties. In 1790, Congress enacted the Indian Trade and Intercourse Act (the Nonintercourse Act), presently codified at 25 U.S.C. § 177 (1988), that provides the Federal Government with the exclusive authority to sign treaties with the various Indian tribes, and thus prohibits the individual states from signing such treaties. To the extent that the states did sign treaties affecting Indian land titles with the various Indian tribes in violation of the Nonintercourse Act, the Supreme Court has stated that such a land conveyance without the sovereign's consent would be void *ab initio*. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 245, 105 S.Ct. 1245, 1257, 84 L.Ed.2d 169 (1985).

On March 3, 1840, the State of South Carolina (State), without the consent or participation of the United States, entered into the Treaty of Nation Ford with the Tribe. As a result of this treaty, the Tribe ceded its interests in the 144,000-acre tract to the State, the State in return promised to purchase for the Tribe another tract of land valued at $5,000, as well as to pay $16,000 over a nine-year period. However, the only land subsequently purchased for the Tribe by the State was a 630-acre parcel of land

purchased in 1842 for $2,000. This is the only land actually occupied by the plaintiff Tribe today.

Over the next 100 years, the Tribe, with little success, communicated with various federal and State officials concerning its claim to the 1763 Treaty lands, which were ceded to the State of South Carolina in the Treaty of Nation Ford.[1] However, in 1943, the Tribe, the State and the Secretary of the Interior reached an agreement under which the Secretary of the Interior accepted legal title to some 3,434 acres of land to be held in trust for the Tribe. All of this land was within the boundaries of the 1763 Treaty reservation. In addition, this agreement did not require the Tribe to release its claim for the return of the remaining 140,000 some acres, although such a release had been proposed in a preliminary draft of the agreement. Thereafter, in 1944, the Secretary of the Interior approved the Catawba Tribe's constitution under the Indian Reorganization Act.[2]

In 1953, Congress declared that as a matter of policy, the United States was to terminate the Federal

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[1] The Tribe was represented by legal counsel during at least part of this time. For example, in 1905, the Tribe's formal request for assistance that was directed to the Bureau of Indian Affairs was accompanied by a "lengthy legal brief * * * and set forth the legal basis of the claim, *i.e.*, that the Catawbas' lands were protected by federal law (the Nonintercourse Act)." Complaint ¶ 16(h). The Commissioner of Indian Affairs denied the request.

[2] Complaint ¶ 18.

Government's trust responsibilities toward Indian tribes,[3] and in 1958 the United States began an active effort to terminate federal supervision over the Catawba Tribe. During the next four years, Department of the Interior officials negotiated with tribal leaders to secure tribal consent to termination. Allegedly, during these negotiations, tribal officials were assured by a Bureau of Indian Affairs (BIA) official that tribal termination would not jeopardize the Tribe's land claim. The BIA drafted the termination legislation, and Congressman Hemphill of South Carolina, the sponsor of the legislation, told the Tribe that he would not introduce the bill without its approval. On March 28, 1959, the BIA draft of the bill was read line by line to the Tribe, which then approved the introduction of the legislation.

The Department of the Interior, in its testimony and reports to Congress on the termination bill, indicated that the Tribe consented to the termination proposal. Apparently, however, the Department never notified Congress about the existence of the Tribe's land claim or that the Tribe's consent was allegedly conditioned upon protection of that claim. Nevertheless, on September 21, 1959, the Catawba Indian Tribe of South Carolina Assets Distribution Act, 73 Stat. 592, 25 U.S.C. §§ 931-938 (1959) (Catawba Act or 1959 Act) was enacted. The Catawba Act contained substantially the same line-for-line language that the Tribe had approved, although Congress amended the bill to provide that the Catawba Act could not take effect until a majority of adult members of the Tribe

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[3] H.R. Cong. Res. 108, 83d Cong., 1st Sess. (1953), 67 Stat. B132.

agreed to a division of tribal assets. Allegedly, in an attempt to persuade tribal members to vote for termination, Department of Interior officials told the Tribe that the 1959 Act would not jeopardize the land claim. The majority vote of the adult members of the Tribe was achieved on June 30, 1960, and the termination became effective two years later, on July 1, 1962. Pursuant to the 1959 Act, the 3,434-acre reservation that was the subject of the 1943 agreement between the Tribe, the State of South Carolina, and the Secretary of the Interior, was distributed to the members of the Tribe.

In the mid-1970's, the Tribe retained legal counsel to pursue its land claim to the remaining 140,000 some acres, and petitioned the Department of the Interior to initiate legal action on its behalf to secure the return of that land. The Solicitor of the Department of the Interior was initially favorably disposed towards plaintiff's petition, concluding in 1977 both that the rebuffs given the Tribe in the early 1900's were legally unjustified, and that the 1959 Act did not affect pre-existing rights. Accordingly, he requested that the Department of Justice institute legal action on behalf of the Tribe. However, this request was later withdrawn and the Tribe's petition to the Department of the Interior was eventually denied in 1978 or 1979.

In 1980, plaintiff filed suit in its own name in the Federal District Court of South Carolina, seeking trespass damages and recovery of the land at issue which was the subject of the 1840 Treaty with the State. The District Court granted summary judgment in favor of the State, and ruled that the 1959 Act resulted in the application of the South Carolina ten-year statute of limitations to the

Tribe's claim. On appeal, a panel of the Court of Appeals for the Fourth Circuit reversed. *Catawba Indian Tribe v. South Carolina*, 718 F.2d 1291 (4th Cir. 1983), and that opinion was later adopted by the full Court of Appeals for the Fourth Circuit. *Catawba Indian Tribe v. South Carolina*, 740 F.2d 305 (4th Cir. 1984). Eventually, the suit reached the Supreme Court,[4] which reversed the Court of Appeals and held that the 1959 Act resulted in the application of the South Carolina statute of limitations to the Tribe's land claim.[5] It thereafter remanded the case to the Court of Appeals for the Fourth Circuit to review the District Court's interpretation of the applicable South Carolina statute of limitations. *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 511, 106 S.Ct. 2039, 2047, 90 L.Ed.2d 490 (1986) (*Catawba*).

On remand, the Court of Appeals held that the applicable South Carolina statute of limitations would bar the

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[4] After *certiorari* was granted, the United States, upon the request of the Supreme Court, filed an *amicus* brief in which it indicated that the 1959 Act made the State's statute of limitations applicable to plaintiff's claim.

[5] The relevant section of the Catawba Act provides: "The constitution of the tribe adopted pursuant to the Act of June 18, 1934 (48 Stat. 984), as amended [25 U.S.C. 461 et seq.], shall be revoked by the Secretary. Thereafter, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, *and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction.* Nothing in this subchapter, however, shall affect the status of such persons as citizens of the United States." 25 U.S.C. § 935 (1988) (emphasis added).

Tribe's claim to any lands that had been adversely possessed for ten continuous years during the period between the effective date of the Catawba Act (in 1962), and the date the Tribe filed its land claim (in 1980), and remanded the case to the District Court for further proceedings. *Catawba Indian Tribe v. South Carolina*, 865 F.2d 1444 (4th Cir.), *cert. denied*, 491 U.S. 906, 109 S.Ct. 3190, 105 L.Ed.2d 699 (1989). On remand, the District Court, on July 19, 1990, dismissed the Tribe's claim to approximately 75 percent of the land. The Tribe's claim to the remaining 25 percent of the land is still the subject of active litigation in the Federal District Court of South Carolina.

On June 21, 1990, the Tribe filed this action declaring that the Tribe has now permanently lost approximately 75 percent of its original 1840 land claim. The main thrust of plaintiff's Complaint is that the Government has breached its fiduciary duties to protect the Tribe's 1840 land claim (Complaint, Claims 1 through 3), and to protect it from the effects of the 1959 Act (Complaint, Claims 4 and 7).[6] As earlier indicated, the defendant has now moved to dismiss the Complaint for lack of subject matter jurisdiction pursuant to USCC Rule 12(b).

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[6] Plaintiff also alleges that the defendant breached an implied contract to protect the land claim from the effects of the 1959 Act (Claim 5), that defendant's failure to protect the land claim constitutes a taking of the Tribe's vested property rights in violation of the Fifth Amendment (Claim 6), and that the Government has a continuing duty to quiet title to the land of the 1763 Treaty in the Tribe and distribute such among the members of the Tribe (Claim 7).

Discussion

The Government's motion to dismiss for lack of jurisdiction is premised on two statute of limitations arguments.[7] The first and primary argument is that the plaintiff's claims (all seven claims contained in its Complaint) are time barred and thus outside of this Court's jurisdiction based on 25 U.S.C. § 70k (1976). This is true, asserts the Government, because all of the plaintiff's claims are based on a historical claim for Indian land, which accrued long before 1946 and which was not timely presented to the Indian Claims Commission prior to the expiration period of the applicable statute (August 12, 1951), 25 U.S.C. § 70k. The government's second argument, in the alternative, is based on this Court's own six-year statute of limitations set forth in 28 U.S.C. § 2501 (1988). Here, the Government asserts that, at the latest, all of the plaintiff's claims accrued in 1962 when the Catawba Act went into effect and which terminated any federal responsibility for the Tribe and its individual members. Thus, the plaintiff's claims had to have been presented to this Court before 1968 in order for this Court to have and assert jurisdiction.

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[7] Defendant also argues that the Complaint fails to state a claim upon which relief can be granted, since the decision by the United States whether or not to litigate on behalf of a Tribe is wholly discretionary, rather than a mandatory duty. However, the Court does not have to reach this issue since the defendant's other arguments dispose of this case.

I.

As indicated above, the Government's primary argument is that this Court lacks subject matter jurisdiction over this dispute, since the Indian Claims Commission was the exclusive forum for historic claims (*i.e.*, for wrongs accruing before 1946) asserted against the United States. Defendant contends that all of the plaintiff's claims are based upon the Government's refusal to assist it in obtaining a remedy for its execution in 1840 of the Treaty of Nation Ford with the State of South Carolina. Accordingly, defendant submits that the wrong accrued long before 1946, and that the Tribe was aware that it had a claim against the Government long before 1946. The Government thus concludes that since the plaintiff failed to present its claims to the Indian Claims Commission within five years of August 13, 1946, the claims are now time barred by 25 U.S.C. § 70k.

In its responsive briefing before this Court, the plaintiff agrees that the pre-1946 claims asserted by the Tribe in Claims 1 and 2 of the Complaint are barred by the Indian Claims Commission Act's statute of limitations, but submits that all the other claims contained in its Complaint (*i.e.* Claims 3 through 7) should not be dismissed. Plaintiff emphasizes that its primary claim arises out of Government nonfeasance during the period from 1958 to 1962, which is when the defendant negotiated with tribal officials to terminate the trust relationship with the Tribe.

Unfortunately for the plaintiff, however, the Government is correct in its legal assertions.

Section 12 of the Indian Claims Commission Act (ICCA), 25 U.S.C § 70k (1976), provided an *exclusive* remedy against the United States for Indian tribes' claims first accruing before August 13, 1946. The Indian Claims Commission was established in 1946 to provide a monetary damages remedy against the United States for wrongs allegedly committed by the United States in its dealings with the Indian tribes. Such claims had to be presented to the Indian Claims Commission within five years of August 13, 1946, and could not otherwise be submitted to any court, administrative agency, or Congress.

> The Commission shall receive claims for a period of five years after August 13, 1946, and no claim *existing* before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress.

25 U.S.C. § 70k (1976) (emphasis added). Claims not adjudicated by the Commission were transferred to the United States Court of Claims. Pub. L. No. 94-465, Act of October 8, 1976, 90 Stat. 1990. This Court subsequently inherited the Court of Claims ICCA jurisdiction. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, Apr. 2, 1982, 96 Stat. 25, 46.

The ICCA's purpose, explicit provisions, and legislative construction clearly demonstrate that the "chief purpose of the [ICCA was] to dispose of the Indian Claims problem with finality." *United States v. Dann*, 470 U.S. 39, 45, 105 S.Ct. 1058, 1062, 84 L.Ed.2d 28 (1985) (quoting

H.R. Rep. No. 1466, 79th Cong., 1st Sess. 10 (1945)). As noted recently by this Court,

> [t]he purpose of that statute of limitations was to ensure that "there . . . [would] be a prompt and final settlement of all claims between the government and its Indian citizens, . . . and bring them to a conclusion once and for all."

Te-Moak Bands of Western Shoshone Indians v. United States, 18 Cl. Ct. 74, 80 (1989), quoting *United States v. Dann, supra*, 470 U.S. at 46, 105 S.Ct. at 1062. The legislative history of the ICCA reflects the intention of Congress that the Act:

> would require all pending Indians claims of whatever nature, contractual and noncontractual, legal and nonlegal, to be submitted to this fact-finding body within 5 years, and would outlaw claims not so submitted.

H.R. Rep. No. 1466, 1946 U.S. Code Cong. Service, 1347, 1349. *See also Navajo Tribe v. State of New Mexico*, 809 F.2d 1455 (10th Cir. 1987). In that case, the Navajo Nation argued that the Indian Claims Commission did not have jurisdiction over claims to land. The Court disagreed, stating:

> The language [in the ICAA, § 2] is sweeping, including even claims "based upon fair and honorable dealings" which did not otherwise constitute recognized actions at law or equity. As the legislative history indicates, Congress did not enumerate the cognizable claims under the new Act to narrowly circumscribe the Commission's jurisdiction. Rather, Congress desired to finally provide a forum for the resolution of all possible accrued claims.

> Congress wished to settle all meritorious claims of long standing of Indian Tribes and bands whether those claims were of a legal or equitable nature which would have been cognizable by a court of the United States had the United States been subject to suit and the Indians able to sue, or whether those claims were of a purely moral nature *not* cognizable in courts of the United States under any existing rules of law or equity.
>
> *Otoe & Missouria Tribe of Indians v. United States*, 131 Ct. Cl. 593, 131 F.Supp. 265, 275 (1955) (emphasis in original).

Id. at 1465.

The gravamen of the seven claims alleged in the Complaint is plaintiff's believe that the Tribe was wronged due to the Government's refusal to assist it in obtaining a remedy for its execution in 1840 of the Treaty of Nation Ford with the State of South Carolina. By plaintiff's own admission, the Tribe was aware that any claim it may have had against the United States for its refusal to assist the Tribe in obtaining its aboriginal land, ceded by the 1840 Treaty of Nation Ford, had accrued long before 1946, the effective date of the ICCA. The Tribe was thus on notice that any claim not properly presented to the Indian Claims Commission could not "thereafter be submitted to any court or administrative agency * * * nor * * * entertained by the Congress." ICCA, § 12, 25 U.S.C. § 70k. Accordingly, the Government is correct and all of the plaintiff's claims must be dismissed.

II.

The Government has also argued in the alternative that even if the Court does not find that the plaintiff's claims are time barred by the ICCA statute of limitations, it should find that all of the claims are barred by this Court's own six-year statute of limitations set forth in 28 U.S.C. § 2501 (1988).[8] With respect to plaintiff's Claims 1 through 3, the defendant submits the operative underlying event was the Tribe's 1840 Treaty with the State of South Carolina, and that plaintiff was long aware both of its potential land claim against the State, and the fact that the United States would not act on the claim. With respect to Claims 4 through 7, regarding the Government's alleged failure to protect the Tribe from the effects of the 1959 Act, the defendant argues that since the trust relationship with the United States terminated under the 1959 Act on July 1, 1962, any claim for a breach of trust could not accrue after the relationship was legally terminated. Even if the Government had the fiduciary duties alleged by plaintiff (*e.g.*, to warn of the applicable statute of limitations period), judicial recourse for such a breach was required no later than 1968.

The essence of plaintiff's argument in opposition is that the claim could not have accrued until damage was suffered, and that it was not until 1986, when the Supreme Court ruled in *Catawba* that the land claim was affected by the 1959 Act, that the tribe could determine its

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[8] 28 U.S.C. § 2501 states in pertinent part:

"Every claim of which the United States Claims Court has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."

rights and finally determine whether or not it had suffered damage. *See Fort Mojave Indian Tribe v. United States*, 23 Cl.Ct. 417, 428-31 (1991). Alternatively, plaintiff contends that even if the claim did accrue in 1962, the running of the six-year statute of limitations is tolled by the concealment and misrepresentation of the United States.

Unfortunately for the plaintiff Tribe, the Court must again agree with the government. Even if the ICCA statute of limitations did not preclude the assertion of the plaintiff's claims in this Court, they would all be precluded by this Court's own six-year statute of limitations. All of the plaintiff's claims in its Complaint accrued prior to the Supreme Court's 1986 decision date. Not only was plaintiff's basic land claim *not* inherently unknowable, but plaintiff was well aware that it was ripe nearly 100 years ago, when it asked for the Department of Interior's assistance in obtaining either compensation or a return of the land in the early 1900's.[9] With respect to the effect of the 1959 Act, as noted by the Supreme Court, the express provision of 25 U.S.C. § 935 stating that South Carolina laws "shall apply to [the Tribe] in the same manner they apply to other persons or citizens within the [ ] jurisdiction," established in "unmistakably clear language" that the State's statute of limitations applied to the Tribe. *Catawba*, 476 U.S. at 505-06, 106 S.Ct. at 2043-44.

As the Supreme Court noted,

> [w]e do not accept petitioners' argument that the Catawba Act immediately extinguished any claim that the Tribe had before the statute

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[9] *See supra* note 1.

> became effective. Rather, we assume that the status of the claim remained exactly the same immediately before and immediately after the effective date of the Act, but that the Tribe thereafter had an obligation to proceed to assert its claim in a timely manner as would any other person or citizen within the State's jurisdiction.

Id. at 510, 106 S.Ct. at 2046. Thus, the Catawba Act did not *destroy* plaintiff's claim, it merely put the burden on the plaintiff Tribe to pursue its claim within the State's statute of limitations.[10]

The Government's repeated refusal to pursue the claim on the Tribe's behalf dating back from the early 1900's, coupled with the clear language of the 1959 Act, show that the plaintiff was on notice of the existence and basis of the claim. Thus, the facts underlying the claim

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[10] Defendant notes that the Catawba Act was passed by the entire Congress. Defendant is correct in stating that plenary power with respect to all Indian affairs rests with Congress. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565, 23 S.Ct. 216, 221, 47 L.Ed. 299 (1903). Nevertheless, this power is not absolute. *United States v. Alcea Bank of Tillamooks*, 329 U.S. 40, 54, 67 S.Ct. 167, 174, 91 L.Ed. 29 (1946); *see also United States v. Creek Nation*, 295 U.S. 103, 109-110, 55 S.Ct. 681, 684, 79 L.Ed. 1331 (1935). For example, plenary authority "does not extend so far as to enable the Government 'to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation * * * .' " *Soshone Tribe v. United States*, 299 U.S. 476, 497, 57 S.Ct. 244, 252, 81 L.Ed. 360 (1937) (quoting *Creek Nation*, 295 U.S. at 110, 55 S.Ct. at 684).

In the case at bar, Congress' passage of the Catawba Act did not mean either that plaintiff's land was given to others, or that plaintiff's claim was eliminated. The passage of the Catawba Act only meant that it was up to plaintiff to take timely legal action on its claim.

were neither concealed nor inherently unknowable, and the statute of limitations was not tolled.[11] *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988); *Japanese War Notes Claimants Ass'n v. United States*, 178 Ct. Cl. 630, 634, 373 F.2d 356, 359, *cert. denied*, 389 U.S. 971, 88 S.Ct. 466, 19 L.Ed.2d 461 (1967), *reh'g denied*, 390 U.S. 975, 88 S.Ct. 1020, 19 L.Ed.2d 1192 (1968). Furthermore, this case can be distinguished from *Fort Mojave Indian Tribe v. United States*, 23 Cl.Ct. 417 (1991) which the plaintiff relies upon, since, unlike that case, there was no previous litigation by this plaintiff that resulted in a Supreme Court decree that specifically authorized the Government to seek reconsideration. Since there was no such previous decree for this plaintiff, there was no "potentially viable method for the government to further its trust responsibilities and correct its acknowledged error." *Id.* at 430. Accordingly, the claims accrued by the operation of the 1959 Act (*i.e.*, by 1962), long before the Supreme Court's decision in *Catawba*.

The presence of a fiduciary relationship does not toll the statute of limitations under the facts of this case. While plaintiff has repeatedly alleged Government nonfeasance, nonfeasance by a trustee, as distinguished from repudiation of the trust by the trustee, does not present an exception to tolling. *Hopland Band*, 855 F.2d at 1578; *Cherokee Nation of Oklahoma v. United States*, 21 Cl. Ct. 565,

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[11] Furthermore, the Supreme Court indicated "we perceive no contradiction between the applicability of the state statute of limitations and the assurance that the status of any state claims would not be affected by the Act." *Catawba*, 476 U.S. at 510, 106 S.Ct. at 2046.

571 (1990); *Jones v. United States*, 9 Cl. Ct. 292, 295 (1985), *aff'd*, 801 F.2d 1334 (Fed. Cir. 1986), *cert. denied*, 481 U.S. 1013, 107 S.Ct. 1887, 95 L.Ed.2d 495 (1987). The present facts present a strong case for not tolling the statute of limitations, since the fiduciary relationship was not even arguably ongoing, as the 1959 Act expressly *terminated* the guardianship.[12] *Cf. Fort Mojave Indian Tribe v. United States*, 23 Cl.Ct. 417 (1991) (previous Supreme Court decree created mechanism by which the Government could resecure rights for plaintiffs, hence the trust relationship was ongoing).

While plaintiff argues it was not represented by counsel during the termination negotiations in 1958-59, apparently it was sophisticated enough to have legal counsel advising it on its land claims at least several times in the past. In *Menominee Tribe of Indians v. United States*, 726 F.2d 718, 721 (Fed. Cir.), *cert. denied*, 469 U.S. 826, 105 S.Ct. 106, 83 L.Ed.2d 50 (1984), the Federal Circuit found that the running of the statute of limitations would not be tolled when "the Indians were capable enough to seek advice, launch an inquiry, and discover through their agents the facts underlying their current

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[12] The general relationship between defendant and Indian tribes has often been characterized as that of a guardian to a ward, rather than as a trustee to a beneficiary. *United States v. Mitchell*, 463 U.S. 206, 234 n.8, 103 S.Ct. 2961, 2978 n.8, 77 L.Ed.2d 580 (1983). This type of relationship implies that at some point the ward will begin to take responsibility for handling its own affairs. *See e.g. Cherokee Nation*, 21 Cl. Ct. 565, 573 (1990). Certainly, terminating a guardianship is an indication that the ward is expected to take responsibility for handling its own affairs.

claim." The court emphasized that the six-year statute of limitations, set forth in 28 U.S.C. § 2501, is not tolled by the Indians' ignorance of their legal rights. *Menominee,* 726 F.2d at 720-21. Plaintiff presents a similar situation here, with a similar result.

Accordingly, the claims accrued well over six years ago, and certainly no later than 1962, and the presence of a fiduciary relationship, even if it were ongoing (which it was not), does not serve to toll the statute of limitations. since the facts alleged in the Complaint reveal no possible basis on which the plaintiff can prevail, the defendant's motion to dismiss for lack of subject matter jurisdiction under USCC Rule 12(b)(1) is granted. *W.R. Cooper Gen. Contractor, Inc. v. United States,* 843 F.2d 1362, 1364 (Fed. Cir. 1988).

CONCLUSION

Defendant's motion to dismiss under USCC Rule 12(b)(1) is granted as the instant claims are barred by the statute of limitations discussed herein. The Complaint is to be dismissed for lack of subject matter jurisdiction, and judgment shall issue accordingly.

Each party is to bear its own costs.

APPENDIX C

UNITED STATES CLAIMS COURT

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	)	Docket No. 90-553 L COMPLAINT

INTRODUCTION

1. This is an action for money damages against the United States. This case arises out of defendant's breach of trust duties founded in federal treaty, federal statute, and federal common law; defendant's breach of contract; and defendant's taking of property without payment of compensation in violation of the Fifth Amendment to the United States Constitution.

JURISDICTION

2. The United States Claims Court has jurisdiction of this suit under 28 U.S.C. §§ 1505 and 1491, in that plaintiff states a claim for: 1) damages against the United States arising under the Constitution, laws, and treaties of the United States; and 2) damages against the United States founded upon breach of an implied contract with the United States.

PLAINTIFF

3. Plaintiff Catawba Indian Tribe of South Carolina (Tribe) is a tribe of Indians that has resided in South Carolina in the vicinity of its present reservation since time immemorial. In 1760 and 1763, plaintiff entered into two treaties with the King of England. The Tribe currently resides on a reservation of approximately 630 acres outside the City of Rock Hill, South Carolina, which reservation is held in trust for the Tribe by the State of South Carolina. The Catawba Tribe is recognized as an Indian tribe by the United States, having been the subject of congressional legislation enacted in 1848, 1854, and 1959. Federal supervision and the government-to-government relationship between the Tribe and the United States were terminated by the 1959 Catawba Tribe of South Carolina Division of Assets Act, 25 U.S.C. §§ 931-938. The Catawba tribal government is presently organized pursuant to its inherent sovereign powers and under the laws of South Carolina as a nonprofit corporation.

FACTS

4. In 1760, the Honorable Edmund Atkin, Esq., His Majesty the King of England's Agent to and Superintendant [sic] for Indian Affairs in the Southern District of North America, negotiated a treaty with the Catawba Indian Nation whereby the Catawba Nation agreed to surrender its claims to a tract encompassing all lands within a 30-mile radius of the Catawba towns, which tract had been recognized as Catawba Indian Country by the Colony of South Carolina, in return for being permanently and quietly settled on a tract of land fifteen miles

square, which was to be surveyed to prevent intruders and upon which a fort was to be built for the Catawbas' protection. This treaty is known as the Treaty of Pine Tree Hill. By entering into this treaty, the Crown recognized the property rights of the Catawba Nation in these lands, rights which predated any United States interest in the area. These property rights were – and remain – recognized Indian title.

5. On October 7, 1763, King George III of England issued the Royal Proclamation of 1763, 1 LAWS U.S. 443-48, which ordered that no warrants of survey or patents be issued upon any lands which had been reserved to the Indians and further forbade private purchases of lands from the Indians and settlement upon Indian lands. This Proclamation established the policy that all grants of land from the Indians would be valid only with the approval of the Sovereign.

6. On November 16, 1763, His Majesty's Superintendant [sic] for Indian Affairs in the Southern District, John Stuart, together with the Governors of the Southern Colonies, including South Carolina, negotiated the Treaty of Augusta with, among others, the Catawba Indian Nation. The Catawbas were told that the negotiators were acting "in the name and at the command of the Great King George" and that "our King and Father holds out his arms to receive and protect you from all your enemies and . . . you may be assured of his confirming to you all of your lands and hunting grounds" pursuant to the 1760 Treaty of Pine Tree Hill. This treaty provided that the Catawba Nation would remain satisfied with the agreement contained in the 1760 Treaty of Pine Tree Hill, and the Governors and Superintendant [sic] in their part

promised that the terms of the Treaty of Pine Tree Hill would be fulfilled. COLONIAL RECORDS OF NORTH CAROLINA, vol. 2, 180-201 (1890).

7. The 1763 Treaty, together with the 1760 Treaty, established a fiduciary duty on the part of the Crown to protect the Tribe in quiet possession of its reservation and to prevent encroachment on the Tribe's reservation by non-Indians.

8. In 1772, the King's Superintendent of Indian Affairs, John Stuart, took affirmative actions to enforce the provisions of the 1760 and 1673 [sic 1763] Treaties and protect the Tribe in possession of its reservation, thus demonstrating that the Crown understood that it had undertaken fiduciary obligations to protect the Tribe in possession of its lands. Specifically, the King's Superintendent took action to defeat a plan by members of the South Carolina Legislature to lease the land to one of its members. The King's Superintendent, in a letter dated December 27, 1772, explained to the Governor the meaning of the Treaty and the Crown's obligations:

> The Land now Occupied by the Catawba Indians being a parcel of Fifteen Miles Square was, as well as a very considerable Extent of Country besides possessed by them when the Subjects of England first Settled in this part of the World; At the Congress held at Augusta in 1763, by the Governors of Virginia So. & North Carolina & Georgia and the Superintendant of Indian Affairs in the Southern District. The said parcel of Land of Fifteen Miles Square, being judged by the Remains of the Said Once numerous and powerful Nation . . . to be Sufficient for their Support & Maintenance . . . and in

> Consideration of their Having Voluntarily relinquished their Claims to a very extensive Territory as also of their Having been always faithfully & Cordially Attached to the British Interest, was in the most Solemn Manner reserved for their use by Treaty to the Observation of which the said Governor and Superintendant bound Themselves & Their Successors.
>
> The Catawbas never have by any Treaty or Publick Act Ceded the Land so Reserved to them by said Treaty of Augusta in 1763 to His Majesty, and Such a Cession cannot be negotiated for or accepted of, for & on Behalf of His Majesty, by any other person, than His Agent for & Superintendant of Indian Affairs without a Manifest Violation of His Majesty's Orders . . .
>
> Your Excellency & the Honorable Council, cannot in my humble Opinion with any Propriety or Shadow of Right grant or lease the Whole or any Part of the Catawba Lands for any purpose or upon any Pretence whatsoever until they shall have been first Ceded by said Indians to the Superintendant for His Majesty, without a Violation of every Order and Instruction Relative to Indian Lands.

Stuart's efforts to defeat the plan were successful and his position on the matter was upheld by the Crown. In a letter to Stuart dated May 5, 1773, the Crown informed Stuart that "[t]he King very much approves the step you took to defeat Mr. Drayton's intended views."

9. Upon the independence of the United States from Great Britain, the United States put itself in the place of the former sovereign and became invested with all of its

rights and obligations under the Treaties of 1760 and 1763, as described in paragraphs 4, 6, 7 and 8 above.

10. On July 22, 1790, Congress enacted the Indian Trade and Intercourse Act, presently codified at 25 U.S.C. § 177, which continued the policy of the 1763 Proclamation and which provided then as it does now that no interest of any kind may be acquired in the lands of any Indian tribe other than by treaty or convention entered into pursuant to the Constitution, to which the United States is a party. Any interest acquired in violation of 25 U.S.C. § 177 is void in law and equity. The Indian Trade and Intercourse Act establishes a trust duty on the part of the United States to protect the lands of any Indian tribe, including those of the Catawba Indian Tribe.

11. On March 3, 1840, the State of South Carolina, without the consent and participation of the United States, concluded the Treaty of Nation Ford between the State and the Catawba Indian Tribe, whereby the State purported to extinguish the recognized Indian title of the Catawba Tribe to the entire 15 mile square tract secured to the Tribe in the 1760 and 1763 Treaties described in paragraphs 4 and 6 above. In return, the State promised to purchase for the Catawbas, at a cost of $5,000, a tract of land either in Haywood County, North Carolina, or in a similarly mountainous and unpopulated area in South Carolina and, in addition, agreed to pay the Tribe $2,500 cash and $1,500 per year for nine years.

12. On December 18, 1840, the Legislature of the State of South Carolina enacted legislation ratifying and

confirming the March 3, 1840 state treaty, which act provided for the conveyance of the title and interest purportedly acquired by the State of South Carolina in Catawba Reservation lands to the non-Indian lessees of such lands upon the application and payment by the lessees of certain fees or taxes.

13. The Congress of the United States has never ratified or otherwise consented to the alienation of the Catawba Indian Reservation. Such ratification or consent is required by 25 U.S.C. § 177 and the federal common law for an alienation of Indian land to be effective. Thus, except as it is affected as a result of the acts, omissions and misrepresentations of the United States that give rise to this lawsuit, recognized Indian title and the right of possession to the 1763 Treaty Indian Reservation lands remains in the Catawba Indian Tribe and that land is not now and never has been the property of any other person or party. The Tribe's right and title to these lands is now and has since 1789 been subject to a federal trust responsibility founded in federal treaty, statute and common law, and protected by the Fifth Amendment to the United States Constitution.

14. Following the 1840 treaty, the State did not purchase a new reservation for the Catawba Tribe in North Carolina or in South Carolina as required by the 1840 treaty. Instead, in 1842 the State of South Carolina bought back a 630 acre tract located within the boundaries of the 1763 reservation which the Tribe had purportedly ceded to the state in the 1840 Treaty. The State paid $2,000 for this tract, which remains to this day the only land actually occupied and enjoyed by the Catawba Tribe.

15. Since prior to the adoption of the Constitution, the United States has been aware that the Catawba Tribe possessed recognized Indian title to lands in South Carolina and that the Tribe's lands were being encroached upon by non-Indians:

a. In 1782, the Catawba Tribe petitioned the Continental Congress to protect its reservation lands.

b. In 1791, chiefs of the Catawba Nation met President George Washington in Lancaster County, South Carolina and asked for protection of their treaty lands.

c. In 1825, President James Monroe and Secretary of War John Calhoun reported to the Senate that the Catawbas were among those tribes which still held lands within the United States. An attached War Department chart indicated the Catawbas possessed 144,000 acres.

16. Since shortly after the 1840 Treaty described in paragraph 11 above, the United States has been aware that the Catawbas lost possession of their lands without the participation or approval of the United States, that the Catawbas were homeless and destitute for extended periods of time, that the Catawbas contested the 1840 Treaty and that the Catawbas desired federal assistance in securing the return of their lands or otherwise resolving their claim arising out of the 1840 Treaty:

a. In the Act of July 29, 1848, Congress acknowledged the existence of the Catawba Tribe and demonstrated the United States' awareness that the Tribe had lost its lands by appropriating funds for the removal of the Catawbas west of the Mississippi River.

b. *The 1849 Annual Report of the Commissioner of* Indian Affairs notes the failure to find a home for the Catawbas among the Chickasaws in Indian Territory.

c. In the Act of July 31, 1854, 10 Stat. 315, 316, Congress again recognized the existence of the Catawba Tribe and again appropriated funds for their removal west of the Mississippi.

d. In 1887, Catawba Chief Thomas Morrison visited the Interior Department and petitioned the United States for assistance in resolving the Tribe's claim to its 144,000 acre treaty reservation.

e. Also in 1887, James Kegg wrote to Secretary of the Interior L.L.C. Lamar requesting United States assistance in reaching a settlement concerning the Catawba lands in South Carolina.

f. In a letter dated November 28, 1889, Catawba Indian P.H. Head wrote to Senator William Teller inquiring as to the rights of the Catawbas to a 15 mile square tract of land in South Carolina, noting that in 1885 Catawba Indian James Harris visited Washington to investigate this claim.

g. In an 1895 "Petition and Memorial in the Matter of Claims and Demands of the Catawba Indian Association, to the United States," a group of Catawbas asked the United States to investigate the claims of the Catawba Tribe and secure justice for the Tribe. They inquired whether the Catawbas have tribal lands in South Carolina to which title has not been extinguished and whether Catawbas may receive allotments of land under the General Allotment Act of 1887.

h. In 1905, the Catawba Tribe submitted to the Bureau of Indian Affairs a formal request for assistance based upon the requirements of the Nonintercourse Act asserting that the Tribe was entitled to rentals from the 1763 treaty reservation or to recovery of possession of the land. The Tribe's request was accompanied by lengthy legal briefs which documented the history of the reservation and set forth the legal basis of the claim, *i.e.*, that the Catawbas' lands were protected by federal law (the Nonintercourse Act). The Commissioner of Indian Affairs denied the request in 1906 based upon an erroneous legal interpretation that the Catawbas and their lands were not protected by federal law.

i. In 1908, the Catawba Tribe again petitioned the United States for aid in securing from the State of South Carolina the land belonging to the Tribe in York and Lancaster Counties or, in the alternative, adequate compensation for the land. The petition, again accompanied by lengthy legal briefs detailing the history and the federal law basis of the claim, further requested the aid of the Justice Department in seeking a judicial determination of the claim. The Commissioner of Indian Affairs denied the Tribe's request in 1909.

j. In 1910, the United States Indian Service of the Department of the Interior directed an investigation of the Catawba Tribe and their claims against the State. In 1911, Special Indian Agent Davis submitted a 21-page report detailing the circumstances of the Tribe, their legal status as wards of the State without citizenship or access to the courts, their belief that the 1840 Treaty was unfair and illegal and their desire to secure a return of their reservation lands. Special Agent Davis told the Tribe that

their desire to secure a return of their lands was unrealistic and that they should submit their claim to the mercy of the State legislature. The 1911 Report of the Commissioner of Indian Affairs acknowledges and discusses the Catawba Tribe's unresolved land claim.

k. In 1912 and 1913, the State of South Carolina requested the United States to take responsibility for the Catawba Tribe.

l. In 1926, J. Clifford Newell wrote to the Commissioner of Indian Affairs stating that he had been contracted by the Catawba Indians to investigate their land claims with the view of regaining possession of the land.

m. In 1929, Catawba Chief Blue wrote to the Commissioner of Indian Affairs, stating that the Tribe was looking forward to a final settlement of its land claim with the State of South Carolina and asking how such settlement could be structured.

n. In 1930, the United States Senate authorized the Bureau of Indian Affairs to investigate the Catawba Indians. Sen. Res. No. 217, 71st Cong., 2d Sess. (Feb. 26, 1930).

o. In 1930, a subcommittee of the Senate Committee on Indian Affairs held hearings in Rock Hill, South Carolina and visited the Catawba Indian Reservation. The Tribe's land claim arising out of the 1840 treaty was discussed at length, as was the extreme poverty and hardship occasioned by the Tribe's loss of possession of its reservation.

p. In 1932, Catawba Chief Samuel Blue wrote to President Herbert Hoover asking for assistance for the Catawba Tribe.

q. In 1933, Catawba Agent T.O. Flowers wrote to Commissioner John Collier requesting assistance for the Catawba Tribe.

r. In 1934, Catawba Chief Samuel Blue wrote to President Franklin D. Roosevelt appealing for assistance to the Catawba Tribe.

s. In 1935, the Bureau of Indian Affairs conducted an extensive investigation of the Catawba Reservation and alternatives for federal assistance in rehabilitating the Tribe and its members.

t. In a January 1937 letter from Professor Speck of the University of Pennsylvania, the Commissioner of Indian Affairs was advised of an offer to the Catawba Tribe by the State of South Carolina to settle the Tribe's claim to 144,000 acres for $250,000. D'Arcy McNickle investigated the proposed settlement at the direction of the Commissioner and submitted a report to the Commissioner stating, among other things, that the State had taken the Tribe's lands in an 1840 treaty, that the state had not fulfilled the terms of the treaty, and that the state had on occasion in the past acknowledged that the 1840 treaty was never fairly carried out. McNickle also reported that the Catawba Indians' economic condition was as hopeless as it could be.

u. In 1938 and 1940, the Interior Department opposed legislation that, if enacted, would have extended federal services to the Catawba Tribe, and further would

have provided for establishment of a larger reservation for the Tribe at no cost to the United States.

v. In 1939, Catawba Indian P.H. Head wrote President Roosevelt stating that both the State of South Carolina and the United States have ignored the Tribe's land claim and requesting that a settlement be made.

w. In 1940, BIA official Ward Shepard reported that the Catawba Tribe probably has a claim against the State of South Carolina arising out of the 1840 treaty.

x. In 1941, the Interior Department took affirmative steps to protect the Tribe's land claim and refused to accede to the desires of the State of South Carolina that a proposed agreement for rehabilitation of the Catawba Tribe include a provision for extinguishment of the Tribe's land claim. In a 1942 memorandum to the Commissioner of Indian Affairs, the Solicitor noted with approval that the claim-extinguishment provision had been deleted, characterizing the claim as one which the Tribe "might be able to enforce in the courts."

y. On December 14, 1943, the State of South Carolina, the Catawba Indian Tribe and the Secretary of the Interior entered into a Memorandum of Understanding to provide relief and rehabilitation assistance to the Catawba Tribe. The agreement did *not* provide for extinguishment of the Tribe's claim. Pursuant to the agreement, the Secretary accepted title to 3,434 acres of land, more or less, and held the same in trust for the Catawba Tribe of South Carolina.

17. In 1944, the Solicitor of the Interior Department in a written opinion concluded that the Catawba Tribe

had been federally recognized since the 1848 Congressional Act described in paragraph 16 a. above, and that the Tribe was therefore eligible to adopt a constitution under the Indian Reorganization Act.

18. On June 30, 1944, the Secretary of the Interior approved the Catawba Tribe's constitution under the Indian Reorganization Act.

19. In 1953, Congress declared it to be the policy of the United States to terminate the Federal Government's trust responsibilities toward Indian tribes.

20. In 1958, Congress and the Eisenhower Administration revised the termination policy to abandon coercive termination and require tribal consent as a prerequisite to termination of federal trust relationship.

21. During the period 1958 to 1962, the Department of the Interior acted consistently with the revised federal termination policy: Interior Department officials negotiated with the tribal leaders to secure tribal consent to its termination proposal and the sponsoring Congressman and Congress itself took measures to ensure that the Tribe consented to termination.

22. At no time during the period 1953 to 1962, during which the Federal Government implemented its plan to terminate the federal trust relationship with the Catawba Tribe, was the Catawba Tribe represented by legal counsel.

23. In addition to the fiduciary duties founded in federal treaty, statute and common law, the United States, through its affirmative acts, representations, and conduct,

has undertaken the fiduciary responsibility of protecting the Tribe's land claim.

24. In 1958, when the United States began its active effort to terminate federal supervision and services to the Catawba Tribe, the United States had full knowledge of the Tribe's land claim and the fact that the Tribe had consistently, over at least the previous 70 years, contested the validity of the 1840 state treaty.

25. In its efforts to secure the Tribe's consent to its termination proposal, federal officials took advantage of tribal dissatisfaction with the BIA's failure to provide services under the 1943 Memorandum of Understanding and the Trie's [sic] resultant inability to productively use the 3,434 acres held in trust by the Secretary. Federal officials characterized termination to the Tribe as a process for dividing the Tribe's 3,434 acres, acquired in 1943, among tribal members. Through this device, the Indians were told, they would be given full title to their lands and as a result would be able to mortgage the land to finance housing and farming, etc., assistance which the BIA was unable or unwilling to provide.

26. In 1958, the Bureau of Indian Affairs assigned Program Officer Raymond Bitney to the Catawba Reservation for the purpose of securing tribal consent to the Bureau's plan to terminate federal responsibilities to the Catawba Tribe.

27. To secure tribal consent to termination in late 1958 and early 1959, Bitney met numerous times with individual Catawba Indian leaders and family heads in their homes and filed reports detailing the results of his meetings and the attitudes of the tribal members with

whom he spoke. Bitney's report of January 30, 1959 reveals that in late 1958 several tribal officials expressed concern about the Tribe's land claim against the state, with one tribal official stating that the BIA's proposed division of tribal assets could not go forward until after the Tribe's land claim was resolved. The tribal officials were assured by Bitney that the Tribe's land claims would not be jeopardized by the Bureau's proposal to terminate federal responsibilities. At no time did Bitney advise the Tribe to seek independent legal counsel.

28. On January 3, 1959, Bitney attended the General Council meeting at which the Tribe voted to accept the Federal Government's proposal to divide tribal assets. No written resolution was considered by the Tribe at this meeting.

29. Prior to January 26, 1959, Agent Bitney was asked to draft a written resolution for the Tribe in support of termination. On January 24, 1959, in a meeting with Chief Albert Sanders, Bitney drafted the resolution for the Tribe "making sure it was exactly what Albert wanted" and had it typed for the Chief. The resolution was back-dated to January 3, 1959. Agent Bitney then accompanied Chief Sanders to visit each of the other Executive Committee members and have them sign the resolution.

30. The resolution drafted by Bitney specifically conditioned the Tribe's consent to termination upon nothing in the legislation affecting the status of any claim against the State of South Carolina by the Catawba Indian Tribe. Thereafter, the BIA sent the resolution to Congressman Robert W. Hemphill.

31. On January 26, 1959, Congressman Robert W. Hemphill requested the BIA to draft legislation "to accomplish the desire [of the Tribe] set forth in the Resolution."

32. On February 5, 1959, Douglas Summers Brown (Mrs. Henry Dockery Brown), author of The Catawba Indians: People of the River, wrote to Agent Bitney documenting the existence of a tribal claim and setting forth in detail a history of the 1840 state treaty and the eventual creation of the 630 acre State reservation. Brown also stated her conclusions that the Tribe had never been paid in full for the lands taken from it by the State and that "[t]herefore, any agreement or settlement made now cannot be final, but the question will be brought up again and again in the future."

33. Prior to March 28, 1959, the BIA drafted termination legislation for Congressman Hemphill. This legislation did not mention the land claim but did provide generally for the application of State law to the Tribe and for the nonapplicability of federal laws which affect Indians because of their status as Indians.

34. On March 28, 1959, Congressman Hemphill and Bureau of Indian Affairs officials met with the Tribe and reviewed the bill. Congressman Hemphill told the Tribe, according to the BIA's minutes of the meeting, that he had had the "legislation drawn up to carry out the intent of the resolution" and that he would not introduce the bill without the Tribe's approval. Relying on the assurances of federal officials that the claim would not be jeopardized and that the officials were acting in the

Tribe's best interest, the Tribe then approved introduction of the legislation.

35. The Catawba Indian Tribe understood the proposed legislation being considered at the March 28, 1959 meeting to be a "contract that was drawn up by the Bureau of Indian Affairs:" it was exclusively characterized as such in the tribal minutes of the March 28 meeting and that is what was voted on and approved at the March 28 meeting.

36. Both the federal officials who negotiated to obtain tribal consent to termination of federal supervision and the tribal officials who consented, understood and intended that a condition of tribal consent was that the land claim would not be jeopardized or affected in any way by the enactment of the legislation being proposed by the Interior Department.

37. Agent Bitney, as well as the other federal officials who met with officials of the Catawba Tribe for the purpose of obtaining tribal consent, had actual authority to bind the United States to the conditions upon which tribal consent had been obtained.

38. On April 6, 1959, BIA Assistant Commissioner Reid wrote Agent Bitney congratulating him on the success of the Catawba termination proposal and notifying Bitney that the BIA had edited his report: "For your information, we have deleted any controversial statements with the idea that in the event they are called for by the committee, a clean report free of controversial issues will be available for them. We are retaining your draft copies in our confidential file."

39. In its testimony and reports to Congress on the termination bill, the Department of the Interior emphasized that the Catawba Tribe had consented to its termination proposal, but did not mention to Congress that the Tribe's consent had been conditioned upon protection of its land claim.

40. In its testimony and reports to Congress on the termination bill, the Department of the Interior failed to even mention the existence of the Tribe's claim, and misrepresented to Congress the history of the Tribe's reservation in such a fashion as to mislead Congress. The Departmental Reports falsely stated that the Tribe's 1763 Treaty was with South Carolina when in fact the Treaty was with the King of England, thereby creating the false impression that the United States had no obligation under the 1763 Treaty. Furthermore, the Departmental Reports falsely stated that the 1840 treaty was a cession by the Tribe of all but its present 640 acre reservation and created the false impression that the Tribe's loss of possession of its 1763 treaty reservation was not contested by the Tribe and that the Tribe had no claims arising out of the loss of possession of its treaty reservation. Specifically, the Departmental Report stated:

> The Catawba Indians in South Carolina have only a relatively short history of relationships with the Federal Government. They made a treaty with South Carolina on November 10, 1763, by which their original reservation was set aside for them. In 1840 they agreed with the State to a cession of this reservation with the exception of a single square mile of land, which is still held in trust for them by the State. In return for the Catawba land, the State provided

> services to them. The United States never made a treaty with these Indians. they [sic] have no claims filed with the Indian Claims Commission.

41. Congress enacted the Catawba Indian Tribe of South Carolina Division of Assets Act on September 21, 1959, 25 U.S.C. §§ 931-938, without amending the language which the Tribe had approved on March 28, 1959, and which the Tribe had been assured would not jeopardize or affect the land claim or its status.

42. Congress did, however, amend the bill to provide that the 1959 Act would not take effect until a majority of the adult members of the Tribe agreed to a division of tribal assets in accordance with the termination act. The Department of the Interior announced tribal agreement on June 30, 1960. The termination act did not become effective until two years later on July 1, 1962.

43. All federal trust responsibilities to preserve and protect tribal property and claims continued in full force and effect until the effective date of the termination act on July 1, 1962.

44. Throughout the period of time following enactment of the termination act and up to June 30, 1960, when the Department of the Interior announced that a majority of the Catawbas had voted to accept the termination act, Interior Department officials actively sought to persuade tribal members to vote for the termination act and continued to assure the members of the Tribe that the 1959 Act would not jeopardize their land claim and that the 1959 Act implemented the Tribe's resolution dated January 3, 1959. Tribal members who agreed to termination relied on the representations and assurances of federal officials.

45. A July 11, 1961 letter from BIA Program Officer Arthur Arnston to the Commissioner of Indian Affairs forwards to the Commissioner a copy of Mrs. Brown's letter of February 5, 1959 to Agent Bitney regarding the Tribe's land claim, described in paragraph 32 above. Arnston states that "the Catawba land claim . . . is often mentioned by Chief Albert Sanders. Sr." The Program Officer concludes: "I have made no comments."

46. At no time did the United States advise the Tribe of the necessity of filing a lawsuit within a timeframe in order to protect the claim from the running of a statute of limitations, nor did the United States file, on behalf of the Tribe, a protective lawsuit within the limitations period which had become applicable as a result of the 1959 Act.

47. The United States concealed from the Tribe its failure to protect the Tribe's land claim and, as a result, the Tribe was unaware that a limitations period had been applied to its land claim.

48. From the date of enactment of the termination act, until May 1985, when the United States filed an amicus brief in the United States Supreme Court arguing that the 1959 Act imposed state statutes of limitation on the Tribe's land claim, the Tribe continued to rely on the misrepresentations of Interior Department officials that the 1959 Act did not jeopardize or affect the land claim or its status.

49. At no time prior to 1985 did the United States advise the Tribe that the 1959 Division of Assets Act might affect or limit the Tribe's land claim.

50. In 1975, the Tribe retained legal counsel to pursue its land claim.

51. In 1976, the Tribe again petitioned the Department of the Interior to initiate legal action to secure the return of the 1763 reservation.

52. In 1977, the Solicitor of the United States Department of the Interior concluded, in a formal litigation request to the Department of Justice, that the Catawba Tribe had been dispossessed of its treaty reservation in violation of federal law; that the 1840 treaty was void; that the Tribe could establish a *prima facie* case for repossession of its reservation under the Nonintercourse Act; that "the United States has had a duty under the Non-intercourse Act, since the Treaty claim accrued in 1840, to take action to protect the Catawba's rightful ownership of the 1763 reservation;" that "this duty was not affected by the 1959 . . . Act;" that the United States "had never taken any action to fulfill its duty to help the Catawba recover the land;" that the United States had denied legal assistance to the Tribe under an erroneous legal theory, and that "the United States had an obligation to bring an action on behalf of the Tribe to obtain return of their lands to tribal ownership." The Solicitor's litigation report concluded: "Thus, the case is a particularly inviting one for a negligence claim against the United States should this Department fail to advocate relief of the Catawba."

53. In 1978 or 1979, Interior withdrew its litigation request after being advised by the Department of Justice that the Attorney General would not authorize suits on behalf of Indian tribes to displace non-Indian occupants of land wrongfully taken from tribes.

54. On October 28, 1980, after the failure of lengthy efforts to settle the claim, the Tribe filed suit in federal district court seeking the return of possession of its 1763 treaty reservation and trespass damages.

55. In 1983, the United States Court of Appeals for the Fourth Circuit held, among other things, that the 1959 Act did not extinguish federal trust responsibility to the 1763 Treaty lands and did not make state statutes of limitations applicable to the Tribe's land claim. *Catawba Indian Tribe v. State of S.C.*, 718 F.2d 1291 (4th Cir. 1983).

56. In 1986, the United States Supreme Court reversed the court of appeals and ruled that the 1959 Termination Act resulted in the application of South Carolina state statutes of limitations to the Catawba land claim. *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498 (1986).

57. In 1989, the United States Court of Appeals for the Fourth Circuit ruled that the applicable South Carolina statute of limitations would operate to bar the Tribe's claim to any lands that had been adversely possessed for ten continuous years, without tacking, during the period between July 1, 1962 (the effective date of the termination act) and October 28, 1980 (the date the Tribe filed its land claim) and remanded the case to the district court for further proceedings. *Catawba Indian Tribe v. State of S.C.*, 865 F.2d 1444 (4th Cir. 1989).

58. As a result of the actions of the United States and the 1986 and 1989 judicial interpretations of the 1959 Act referred to in paragraphs 56 and 57 above, a substantial, though as yet undetermined, portion of the Tribe's land claim was barred and permanently lost before the

United States notified the Tribe in May, 1985 that it believed that the 1959 Act resulted in the application of state statutes of limitations to the Tribe's claim.

59. Based on the prior representations of federal officials and the duties and obligations undertaken by the United States, the Tribe had no reason to know or believe that its claim became subject to state statutes of limitations as a result of the 1959 Act. The Tribe was not made aware that the United States believed that the 1959 Act resulted in the application of state statutes of limitations until the United States filed its brief in the United States Supreme Court in May, 1985 and the Tribe was not made aware that the 1959 Act actually resulted in application of state statutes of limitations until the Supreme Court issued its decision in June, 1986. Both the position taken by the United States in its 1985 brief and the Supreme Court's 1986 interpretation of the 1959 Act, were unanticipated by the Tribe.

60. Prior to the final judicial interpretation in 1986 of the meaning of the 1959 Act with respect to application of state law limitations periods, the Tribe had no way of knowing it had actually suffered damages as a result of actions by the United States. Had the Supreme Court ruled in the Tribe's favor, the Tribe would have no cause of action against the United States arising out of the events and actions surrounding the 1959 Act. Thus, the final judicial determination in 1986 was a prerequisite to enable the Tribe to determine its rights and to determine whether it had suffered damages because of the United States' nonfeasance during the period 1958 to 1962.

61. The acts, omissions, and misrepresentations of the Interior Department, together with the actions of Congress and the 1986 and 1989 judicial interpretations of the 1959 Act referred to in paragraphs 56 and 57 above, have resulted in a substantial, though as yet undetermined, portion of the Tribe's land claim being barred and permanently lost. Because the Tribe's rights in its Treaty reservation are vested property rights protected by the Fifth Amendment to the United States Constitution, the actions of the United States constitute a taking of property without payment of compensation.

62. As a result of the loss of possession of its treaty reservation lands between 1790 and 1840 and the United States' failure to protect the Tribe in possession of its 1763 Treaty reservation lands, the Tribe has suffered great damage.

63. As a result of the United States' repeated refusal to take action to restore the Tribe to possession of its treaty reservation lands, the Tribe has suffered great damage.

64. As a result of the Treaties of 1760 and 1763, the 1790 Nonintercourse Act, the 1943 Memorandum of Understanding, and the affirmative acts, representations and conduct of federal officials, the United States had and undertook control or supervision over Catawba tribal property. This created a fiduciary responsibility on the part of the United States to protect Catawba tribal assets from waste and mismanagement, a fiduciary duty on the part of the United States not to squander tribal lands and claims to lands in favor of third parties, and a fiduciary

obligation to initiate litigation in a timely fashion to protect tribal assets.

65. The Interior Department's misrepresentations to Congress in 1959 and its concealment from Congress of the existence of the Catawba Tribe's land claim and the conditions upon which the Tribe's consent to termination had been obtained, resulted in the enactment by Congress of a law which applied state statutes of limitation to the Tribe's claim. The Interior Department's concealment from the Tribe of its failure to protect the claim from the effects of the 1959 Act, together with its failure to either advise the Tribe that the 1959 Act applied state statutes of limitations to the Tribe's claim or file a protective action on the Tribe's behalf, have resulted in an as yet undetermined portion of the Tribe's land claim being barred and permanently lost, to the Tribe's great damage.

66. Section 3 of the 1959 Act, 25 U.S.C. § 933(f), requires the Secretary of the Interior to sell all assets of the Tribe that are not selected and conveyed to members under the Act and to distribute the proceeds to the Tribe. The Tribe's land claim is an asset of the Tribe within the meaning of the 1959 Act. The Secretary has failed to quiet title to the Treaty Reservation in the Tribe or to sell or convey that asset to a trustee selected by the Secretary for disposition as required by § 933, to the Tribe's great and continuing damage.

CLAIM NO. 1

65. Paragraphs 1 through 66 are hereby incorporated by reference.

66. The United States had treaty, statutory and federal common law fiduciary duties to protect the Tribe in possession of its treaty reservation lands. The United States' failure to carry out those duties, thereby permitting the Tribe to lose possession of its entire treaty reservation, constitutes a breach of trust for which the United States is liable.

CLAIM NO. 2

67. Paragraphs 1 through 66 are hereby incorporated by reference.

68. The United States had treaty, statutory and federal common law fiduciary duties to investigate and take action to restore the Tribe to possession of its treaty reservation. The United States' failure to carry out those duties constitutes a breach of trust for which the United States is liable. The failures of the government and the resulting damage to the Tribe have been continuing.

CLAIM NO. 3

69. Paragraphs 1 through 66 are hereby incorporated by reference.

70. The United States, through treaty, statute, federal common law, agreement and through its conduct and affirmative acts, had and undertook the fiduciary responsibility to preserve the Tribe's assets and specifically to protect the Tribe's land claim. The United States' failure to carry out those responsibilities constitutes a breach of trust for which the United States is liable. The failures of

the government and the resulting damage to the Tribe have been continuing.

CLAIM NO. 4

71. Paragraphs 1 through 66 are hereby incorporated by reference.

72. The United States, through its affirmative acts and conduct, undertook the responsibility to protect the Tribe's land claim from the effects of the 1959 Act: this included the duty to notify the Tribe that, as a result of the 1959 Act and contrary to government officials' assurances, the Tribe would be required to file its land claim within a period of years or it would be barred. The United States' failure to carry out that responsibility constitutes a breach of trust for which the United States is liable.

CLAIM NO. 5

73. Paragraphs 1 through 66 are hereby incorporated by reference.

74. The actions of the United States which have resulted in the permanent loss of the Tribe's claim to possession of a large portion of the 1763 Treaty reservation constitute a breach of a contract implied-in-fact, entered into between the United States and its tribal beneficiaries providing that the United States would, among other things, protect the Tribe's land claim from the effects of the 1959 Act in return for the Tribe's consent to the withdrawal of federal supervision.

CLAIM NO. 6

75. Paragraphs 1 through 66 are hereby incorporated by reference.

76. The actions of the United States which have resulted in the permanent loss of the Tribe's claim to possession of a large portion of the 1763 Treaty reservation constitute a taking of the Tribe's vested property rights in violation of the Fifth Amendment to the United States Constitution.

CLAIM NO. 7

77. Paragraphs 1 through 66 are hereby incorporated by reference.

78. Pursuant to 25 U.S.C. § 933, the United States has a continuing duty to quiet title to the lands of the 1763 Treaty reservation in the Tribe and distribute the proceeds among the members of the Tribe. The United States has failed to carry out that duty. The failure of the government and the resulting damage to the Tribe have been continuing.

RELIEF

WHEREFORE, plaintiff prays that this Court find:

1. That the United States breached its fiduciary duties to the Tribe to:

   a) protect the Tribe in possession of its reservation;

   b) take action to restore the Tribe to possession of its reservation;

c) protect Catawba tribal assets from waste and dissipation;

d) protect the Tribe's land claim from the effects of the 1959 Act;

and is liable for damages arising from that breach.

2. That the United States breached its implied contract with the Tribe to protect the Tribe's land claim from the effects of the Termination Act in return for the Tribe's consent to the United States' termination proposal and that such breach gives rise to contract damages.

3. That the actions of the United States constitute a taking of the Tribe's vested property rights in violation of the Fifth Amendment to the United States Constitution for which compensation and interest to the Tribe is due.

4. That the United States breached its statutory fiduciary duty to quiet title to the 1763 reservation in the Tribe and distribute the proceeds among tribal members and is liable for damages arising from that breach.

Plaintiff further prays that this Court award it damages, the costs of this action, attorney's fees and such further relief as the court may deem appropriate.

DATED this 19th day of June, 1990.

Respectfully submitted,

/s/ Don B. Miller
Don B. Miller
Attorney of Record
NATIVE AMERICAN
RIGHTS FUND
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

Faith Roessel
Of Counsel
Native American Rights Fund
1712 N Street N.W.
Washington, D.C. 20036
(202) 785-4166

Jay Bender
BELSER, BAKER, BARWICK,
RAVENEL & BENDER
Of Counsel
P.O. Box 8057
1730 Main Street
Columbia, SC 29202
(803) 799-9091

Robert M. Jones
Of Counsel
P.O. Box 706, CSS
123 Workman
Rock Hill, SC 29211
(803) 324-2988

Richard Steele
Of Counsel
113 West Main Street
Union, SC 29379
(803) 427-8471

Attorneys for Plaintiff

APPENDIX D

SUPREME COURT OF THE UNITED STATES

October Term, 1985

SOUTH CAROLINA et al., Petitioners

v.

CATAWBA INDIAN TRIBE, INC.

476 US 498, 90 L Ed 2d 490, 106 S Ct 2039

[No. 84-782]

Argued December 12, 1985. Decided June 2, 1986.

APPEARANCES OF COUNSEL

James D. St. Clair argued the cause for petitioners. **Don Brantley Miller** argued the cause for respondent. Briefs of Counsel, p 1104, infra.

OPINION OF THE COURT

Justice **Stevens** delivered the opinion of the Court.

At issue in this litigation is the right to possession of a "Tract of Land of Fifteen Miles square" described in a 1763 treaty between the King of England and the Catawba Head Men and Warriors.[1] The tract, comprising

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[1] The 1763 Treaty of Fort Augusta was entered into by the Catawbas and British and colonial officials, and provides, in relevant part:

"And We the Catawba Head Men and Warriors in Confirmation of an Agreement heretofore entered into with the White People declare that we will remain satisfied with the Tract of Land of Fifteen Miles square a Survey of which by our consent and at our request has been already begun and the respective Governors and Superintendent on their Parts promise and engage that

144,000 acres and 225 square miles, is located near the northern border of South Carolina; some 27,000 persons now claim title to different parcels within the tract. The specific question presented to us is whether the State's statute of limitations applies to the Tribe's claim. The answer depends on an interpretation of a statute enacted by Congress in 1959 to authorize a division of Catawba tribal assets. See 25 USC §§ 931-938 [25 USCS §§ 931-938]. We hold that the State's statute applies, but we do not reach the question whether it bars the Tribe's claim.

Simply stated, the Tribe[2] claims that it had undisputed ownership and possession of the land before the first Nonintercourse Act was passed by Congress in 1790;[3] that the Nonintercourse Act prohibited any conveyance of tribal land without the consent of the United States; and that the United States never gave its consent

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the aforesaid survey shall be compleated and that the Catawbas shall not in any respect be molested by any of the King's subjects within the said Lines but shall be indulged in the usual Manner of hunting Elsewhere." XI Colonial Records of North Carolina 201-202 (1763), reprinted in App 35.

[2] The respondent, Catawba Indian Tribe, Inc., is a nonprofit corporation organized under the laws of South Carolina in 1975. Like the District Court and the Court of Appeals, we assume that the respondent is the successor in interest of the Catawba Indian Tribe of South Carolina. For convenience, we refer to the respondent as the "Tribe" throughout this opinion.

[3] See Act of July 22, 1790, ch 33, § 4, 1 Stat. 138. The Act, now codified at 25 USC § 177 [25 USCS § 177], states in relevant part: "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

to a conveyance of this land. Accordingly, the Tribe's purported conveyance to South Carolina in 1840 is null and void. Among the defenses asserted by petitioners[4] is the contention that, even if the Tribe's claim was valid before passage and enactment of the Catawba Division of Assets Act, § 5 of the Act made the state statute of limitations applicable to the claim. Because that is the only contention that we review, it is not necessary to describe much of the historical material in the record.

I.

In 1760 and 1763, the Tribe surrendered to Great Britain its aboriginal territory in what is now North and South Carolina in return for the right to settle permanently on the "Tract of Land of Fifteen Miles square" that is now at issue. For purposes of this summary judgment motion, it is not disputed that the Tribe retained title to the land when the Nonintercourse Acts were passed.

By 1840, the Tribe had leased most, if not all, of the land described in the 1763 treaty to white settlers. In 1840, the Tribe conveyed its interest in the "Tract of Land of Fifteen Miles square" to the State of South Carolina by entering into the "Treaty of Nation Ford." In that treaty, the State agreed, in return for the "Tract," to spend $5,000 to acquire a new reservation, to pay the Tribe $2,500 in advance, and to make nine annual payments of $1,500 in

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[4] The petitioners include the State of South Carolina and approximately 76 other parties who are named as defendants in the complaint; they were sued as representatives of a class that was alleged to consist of the approximately 27,000 persons who claim an interest in the disputed land.

the ensuing years. In 1842, the State purchased a 630-acre tract as a new reservation for the Tribe, which then apparently had a membership of about 450 persons.[5] This land is still held in trust for the Tribe by South Carolina.

The Tribe contends that the State did not perform its obligations under the treaty – it delayed the purchase of the new reservation for over 2½ years; it then spent only $2,000 instead of $5,000 to purchase the new land; and it was not actually "new" land because it was located within the original 144,000-acre tract. Still more importantly, as noted, the Tribe maintains that this entire transaction was void because the United States did not consent to the conveyance as required by the Nonintercourse Act.

At various times during the period between 1900 and 1943, leaders of the Tribe applied to the State for citizenship and for a "final settlement of all their claims against the State."[6] Petitioners argue that these claims merely sought full performance of the State's obligations under the 1840 treaty, but, for purposes of our decision, we accept the Tribe's position that it was then asserting a claim under the Nonintercourse Acts and thus challenging the treaty itself. In any event, both state officials and representatives of the Federal Government took an interest in the plight of the Tribe.[7]

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[5] An 1825 War Department chart indicated that the Catawbas totaled 450 persons. 2 American State Papers 545 (1925).

[6] See 1920 SC acts 1700, Joint Res No. 904, § 1.

[7] In 1930, a Subcommittee of the Senate Committee on Indian Affairs held hearings in Rock Hill, South Carolina, which is located in the 144,000-acre tract. Senator Thomas of Oklahoma wrote that the "subcommittee . . . found some hundred

In response to this concern, on December 14, 1943, the Tribe, the State, and the Office of Indian Affairs of the Department of the Interior entered into a Memorandum of Understanding which was intended to provide relief for the Tribe, but which did not require the Tribe to release its claims against the State.[8] Pursuant to that agreement, the State purchased 3,434 acres of land at a cost of $70,000 and conveyed it to the United States to be held in trust for the Tribe.[9] The Federal Government agreed to make annual contributions of available sums for the welfare of the Tribe and to assist the Tribe with education, medical benefits, and economic development. For its part, the Tribe agreed to conduct its affairs on the basis of the Federal Government's recommendations; it

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and seventy-five remnants of this band located on a tract of practically barren rock and gradually starving to death." Division of Tribal Assets of Catawba Indian Tribe, Hearings on HR 6128, before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 86th Cong. 1st Sess (unpublished), Insert 5, at 3 (Minutes of State and Federal Conference, Oct. 21, 1958) (6 Record Ex 56), quoting Feb. 10, 1932, letter, Senator Thomas to Commissioner Rhoads.

[8] Preliminary drafts of the Memorandum of Understanding contained a provision extinguishing the Tribe's reservation claim (6 Record Ex 49), but that provision was deleted. The Solicitor of the Department of the Interior emphasized that the agreement should not use "a contract under the Johnson-O'Malley Act in order to deprive the Indian tribe of claims which it might be able to enforce in the courts." United States Department of the Interior, Office of the Solicitor, Memorandum for the Commissioner of Indian Affairs. Id., Ex 50, p 3.

[9] The State also agreed to appropriate at least $9,500 annually for three years for the benefit of the Tribe and to extend to Catawbas the rights and privileges of all citizens, including admission to public schools. Ibid.

thereafter adopted a constitution approved by the Secretary of the Interior pursuant to the Indian Reorganization Act, 25 USC § 476 [25 USCS § 476].

In 1953, Congress decided to make a basic change in its policies concerning Indian affairs. The passage of House Concurrent Resolution 108 on August 1, 1953,[10] marked the beginning of the "termination era" – a period that continued into the mid-1960s, in which the Federal Government endeavored to terminate its supervisory responsibilities for Indian tribes.[11] Pursuant to that policy, the Federal Government identified the Catawba Tribe as a likely candidate for the withdrawal of federal

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[10] That Resolution declared: "[I]t is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship." HR Con Res 108, 83d Cong, 1st Sess (1953), 67 Stat B132.

[11] According to one compilation, between 1954 and 1962, Congress passed 12 separate "Termination Acts," the 11th of which was the Catawba Act. See F. Prucha, The Great Father 1048 (1984). The termination policy has been criticized by various commentators. See, e. g., Cornell, The New Indian Politics, 10 Wilson Q 113, 121 (1986); F. Prucha, supra, at 1046-1059; Wilkinson & Biggs, The Evolution of the Termination Policy, 5 American Indian L Rev 139 (1977); Preloznik & Felsenthal, The Menominee Struggle to Maintain Their Tribal Assets and Protect Their Treaty Rights Following Termination, 51 NDL Rev 53 (1975). The ultimate legislative wisdom of the termination policy is, of course, not before the Court.

services.[12] Moreover, members of the Tribe desired an end to federal restrictions on alienation of their lands in order to facilitate financing for homes and farm operations.[13] Accordingly, after discussions with representatives of the Bureau of Indian Affairs in which leaders of the Tribe were assured that any claim they had against the State would not be jeopardized by legislation terminating federal services, the Tribe adopted a resolution supporting such legislation and authorizing a distribution of tribal assets to the members of the Tribe.[14] After receiving advice that the Tribe supported legislation

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[12] In September 1954, a House Study Subcommittee on Indian Affairs reported that the Catawba Tribe was one of the groups able to take responsibility for their affairs and therefore was ready for termination of federal services. HR Rep No. 2680, 83d Cong, 2d Sess, 2-3 (1954). In contrast to the report made by Senator Thomas in 1930, n 7, supra, the Reports accompanying the Act concluded that the Catawbas had been able to merge into the general community and had been able to attain an economic position comparable to that of non-Indians. See S Rep No. 863, 86th Cong, 1st Sess, 3 (1959) ("The Catawba Indians have advanced economically . . . during the past 14 years, and have now reached a position that is comparable to their non-Indian neighbors"); HR Rep No. 910, 86th Cong, 1st Sess, 2 (1959) (same). Most adult male Catawbas were employed at the time: 47% were in industry, 20% in skilled labor, 7% in the Armed Services, 15% in odd jobs, 5% retired, and 6% on the welfare rolls. S Rep, at 4; HR Rep, at 5.

[13] See 105 Cong Rec 5462 (1959) (statement of Rep. Hemphill); App 102.

[14] The resolution adopted at the meeting of the Tribe on January 3, 1959, expressly noted that "nothing in this legislation shall affect the status of any claim against the State of South Carolina by the Catawba Tribe." Id., at 103.

authorizing the disposal of the tribal assets and terminating federal responsibility for the Tribe and its individual members, Congress enacted the Catawba Indian Tribe Division of Assets Act, 73 Stat 592, 25 USC §§ 931-938 [25 USCS §§ 931-938]. The Act provides for the preparation of a tribal membership roll, § 931; the tribal council's designation of sites for church, park, playground, and cemetery purposes, § 933(b); and the division of remaining assets among the enrolled members of the Tribe, § 933(f). The Act also provides for the revocation of the Tribe's Constitution and the termination of federal services for the Tribe, § 935. It explicitly states that state laws shall apply to members of the Tribe in the same manner that they apply to non-Indians. Ibid. Pursuant to that Act, the 3,434-acre reservation that had been acquired as a result of the 1943 Memorandum of Understanding was distributed to the members of the Tribe; the Secretary of the Interior revoked the Tribe's Constitution, effective July 1, 1962.

In 1980, the Tribe commenced this action seeking possession of the 225-square-mile tract and trespass damages for the period of its dispossession. All of the District Judges for the District of South Carolina recused themselves, and Judge Willson of the Western District of Pennsylvania was designated to try the case. After the development of a substantial record of uncontested facts, Judge Willson granted the petitioners' motion for summary judgment. His order of dismissal was initially reversed by a panel of the Court of Appeals for the Fourth Circuit, 718 F2d 1291 (1983); sitting en banc, the full Court of Appeals adopted the panel's opinion. 740 F2d 305 (1984). Because of the importance of the case, we

requested the views of the Solicitor General of the United States and granted certiorari, 471 US 1134, 86 L Ed 2d 691, 105 S Ct 2672 (1985). We now reverse.

II.

Section 5 of the Catawba Act is central to this dispute. As currently codified, it provides:

> "The constitution of the tribe adopted pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title shall be revoked by the Secretary. Thereafter, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction. Nothing in this subchapter, however, shall affect the status of such persons as citizens of the United States." 25 USC § 935 [25 USCS § 935].

This provision establishes two principles in unmistakably clear language. First, the special federal services and statutory protections for Indians are no longer applicable to the Catawba Tribe and its members. Second, state laws apply to the Catawba Tribe and its members in precisely the same fashion that they apply to others.

The Court of Appeals disagreed with this reading of the Act. For it concluded that the word "them" in the second sentence of § 5 could refer to the individual

Indians who are members of the Tribe and not encompass the Tribe itself. Relying on the canon that doubtful expressions of legislative intent must be resolved in favor of the Indians,[15] it thus held that the language in § 5 about the inapplicability of federal Indian statutes and the applicability of state laws did not reach the Tribe itself.

The canon of construction regarding the resolution of ambiguities in favor of Indians, however, does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress.[16] It seems clear to us that the antecedent of the words "them" and "their" in the second sentence of § 5 is

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[15] DeCoteau v District County Court, 420 US 425, 444, 43 L Ed 2d 300, 95 S Ct 1082 (1975); Antoine v Washington, 520 US 194, 199-200, 43 L Ed 2d 129, 95 S Ct 944 (1975); Mattz v Arnett, 412 US 481, 504-505, 37 L Ed 2d 92, 93 S Ct 2245 (1973).

[16] See Oregon Dept. of Fish and Wildlife v Klamath Indian Tribes, 473 US 753, 774, 87 L Ed 2d 542, 105 S Ct 3420 (1985) ("[E]ven though 'legal ambiguities are resolved to the benefit of the Indians,' DeCoteau v District County Court, 420 US 425, 447 [43 L Ed 2d 300, 95 S Ct 1082] (1975), courts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' Washington v Washington Commercial Passenger Fishing Vessel Assn. 443 US [658, 673 [61 L Ed 2d 823, 99 S Ct 3055] (1979)], clearly runs counter to a tribe's later claims"); Rice v Rehner, 463 US 713, 732, 77 L Ed 2d 961, 103 S Ct 3291 (1983) (canon of construction regarding certain Indian claims should not be applied "when application would be tantamount to a formalistic disregard of congressional intent"); Andrus v Glover Construction Co. 446 US 608, 618-619, 64 L Ed 2d 548, 100 S Ct 1905 (1980); DeCoteau v District County Court, 420 US, at 447, 43 L Ed 2d 129, 95 S Ct 944 ("A canon of construction is not a license to disregard clear expressions of tribal and congressional intent").

the compound subject of the first clause in the sentence, namely, "the tribe and its members." To read the provision otherwise is to give it a contorted construction that abruptly divorces the first clause from the second and the third, and that conflicts with the central purpose and philosophy of the Termination Act. According the statutory language its ordinary meaning, moreover, is reinforced by the fact that the first sentence in the section provides for a revocation of the Tribe's Constitution. It would be most incongruous to preserve special protections for a tribe whose constitution has been revoked while withdrawing protection for individual members of that tribe.[17]

Without special federal protection for the Tribe, the state statute of limitations should apply to its claim in this case. For it is well established that federal claims are subject to state statutes of limitations unless there is a federal statute of limitations or a conflict with federal policy.[18] Although federal policy may preclude the ordinary applicability of a state statute of limitations for this

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[17] Respondent argues that the scope of the Act was merely to terminate the specific federal services arising from the 1943 Memorandum of Understanding. Such a limited interpretation cannot be reconciled with the broader language of the Act ("The tribe and its members shall not be entitled to *any* of the special services performed by the United States for Indians because of their status as Indians"; "*all* statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them"; "the laws of the several states shall apply to them *in the same manner* they apply to other persons or citizens within their jurisdiction") (emphasis added).

[18] See, e. g., Wilson v Garcia, 471 US 261, 266-267, 85 L Ed 2d 254, 105 S Ct 1938 (1985); Board of Regents v Tomanio, 446 US 478, 483-484, 64 L Ed 2d 440, 100 S Ct 1790 (1980); Johnson v

type of action in the absence of a specific congressional enactment to the contrary, County of Oneida v. Oneida Indian Nation, 470 US 226, 84 L Ed 2d 169, 105 S Ct 1245 (1985), the Catawba Act clearly suffices to reestablish the usual principle regarding the applicability of the state statute of limitations. In striking contrast to the situation in County of Oneida, the Catawba Act represents an explicit redefinition of the relationship between the Federal Government and the Catawbas; an intentional termination of the special federal protection for the Tribe and its members; and a plain statement that state law applies to the Catawbas as to all "other persons or citizens."

That the state statute of limitations applies as a consequence of terminating special federal protections is also supported by the significance we have accorded congressional action redefining the federal relationship with particular Indians. We have long recognized that, when Congress removes restraints on alienation by Indians, state laws are fully applicable to subsequent claims.[19]

Railway Express Agency, Inc. 421 US 454, 462, 44 L Ed 2d 295, 95 S Ct 1716 (1975); Auto Workers v Hoosier Cardinal Corp. 383 US 696, 703-704, 16 L Ed 2d 192, 86 S Ct 1107 (1966); Cope v Anderson, 331 US 461, 463, 91 L Ed 1602, 67 S Ct 1340 (1947); Rawlings v Ray, 312 US 96, 97, 85 L Ed 605, 61 S Ct 473 (1941); O'Sullivan v Felix, 233 US 318, 322-323, 58 L Ed 980, 34 S Ct 596 (1914); Chattanooga Foundry & Pipe Works v Atlanta, 203 US 390, 397-398, 51 L Ed 241, 27 S Ct 65 (1906); McClaine v Rankin, 197 US 154, 158, 49 L Ed 702, 25 S Ct 410 (1905); Campbell v Haverhill, 155 US 610, 617, 39 L Ed 280, 15 S Ct 217 (1895); M'Cluny v Silliman, 3 Pet US 270, 277, 7 L Ed 676 (1830).

[19] See, e.g., Larkin v Paugh, 276 US 431, 439, 72 L Ed 640, 48 S Ct 366 (1928) ("With the issue of the patent, the title not only passed from the United States but the prior trust and the inci-

Similarly, we have emphasized that Termination Acts subject members of the terminated tribe to "the full sweep of states laws and state taxation."[20] These

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dental restrictions against alienation were terminated. This put an end to the authority theretofore possessed by the Secretary of the Interior by reason of the trust and restriction – so that thereafter all questions pertaining to the title were subject to examination and determination by the courts, appropriately those in Nebraska, the land being there"); Dickson v Luck Land Co. 242 US 371, 375, 61 L Ed 371, 37 S Ct 167 (1917) ("With those restrictions [of congress] entirely removed and the fee simple issued it would seem that the situation was one in which all questions pertaining to the disposal of the lands naturally would fall within the scope and operation of the laws of the State"); United States v Waller, 243 US 452, 461-462, 61 L Ed 843, 37 S Ct 430 (1917) ("We cannot escape the conviction that the plain language of this act evidences the intent and purpose of Congress to make such lands allotted to mixed-blood Indians subject to alienation with all the incidents and rights which inhere in full ownership in persons of full capacity"); Shrimpscher v Stockton, 183 US 290, 296, 46 L Ed 203, 22 S Ct 107 (1902) (after a treaty removed restraints from alienation of land by certain Wyandotte Indians, state statute of limitations ran against Indians, even though Indians later asserted claim of a prior federal treaty violation; after removal of restraints on alienation, the Indian's heirs "were chargeable with the same diligence in beginning an action for their recovery as other persons having title to lands").

[20] Bryan v Itasca County, 426 US 373, 389, 48 L Ed 2d 710, 96 S Ct 2102 (1976). See also United States v Antelope, 430 US 641, 647, n 7, 51 L Ed 2d 701, 97 S Ct 1395 (1977) ("[M]embers of tribes whose official status has been terminated by congressional enactment are no longer subject, by virtue of their status, to federal criminal jurisdiction under the Major Crimes Act"); Affiliated Ute Citizens v United States, 406 US 128, 31 L Ed 2d 741, 92 S Ct 1456 (1972) (terminated members of Tribe must bring action to invalidate allegedly fraudulent conveyance under same laws as other citizens).

principles reflect an understanding that congressional action to remove restraints on alienation and other federal protections represents a fundamental change in federal policy with respect to the Indians who are the subject of the particular legislation.

The Court of Appeals found support for its conclusion about the nonapplicability of the state statute of limitations in § 6 of the Catawba Act, which provides that nothing in the statute affects the rights of the Tribe under the laws of South Carolina.[21] The thrust of the Court of Appeals' reasoning was that, if a state law was inapplicable to the Tribe or its members before the effective date of the Act, its application after the effective date necessarily violates § 6. But such a reading contradicts the plain meaning of § 5's reference to the applicability of state laws. In our view § 6 was merely intended to remove federal obstacles to the ordinary application of state law.

As the Court of Appeals noted, in Menominee Tribe v United States, 391 US 404, 20 L Ed 2d 697, 88 S Ct 1705 (1968), the Court concluded that the Menominee Termination Act did not terminate the Tribe's hunting and fishing rights. The Court emphasized that the Termination Act must be read in pari materia with an Act passes in the same Congress that preserved hunting and fishing rights. Id., at 411, 20 L Ed 2d 697, 88 S Ct 1705. In this case, of course, there is no similar contemporaneous statute. Moreover, in Menominee, the Court was concerned about a "backhanded" abrogation of treaty rights, id., at 412, 20 L Ed 2d 697, 88 S Ct 1705; no comparable abrogation is at issue here.

[21] As currently codified, § 6 provides:
"Nothing in this subchapter shall affect the rights, privileges, or obligations of the tribe and its members under the laws of South Carolina." 25 USC § 936 [25 USCS § 936].

Section 6 cannot be read to preserve, of its own force, a federal tribal immunity from otherwise applicable state law without defeating a basic purpose of the Act and negating explicit language in § 5.[22] Most fundamentally, § 6 simply does not speak to the explicit redefinition of the federal relationship with the Catawbas that is the basis for the applicability of the state statute of limitations.

Finally, the Court of Appeals relied heavily on the assurance to the Tribe that the status of any claim against South Carolina would not be affected by the legislation.[23] Even assuming that the legislative provisions are sufficiently ambiguous to warrant reliance on the legislative history, we believe that the Court of Appeals misconceived the import of this assurance. We do not accept petitioners' argument that the Catawba Act immediately extinguished any claim that the Tribe had before the statute became effective. Rather, we assume that the status of the claim remained exactly the same immediately

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[22] It is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." Colautti v Franklin, 439 US 379, 392, 58 L Ed 2d 596, 99 S Ct 675 (1979). See also Mountain States Tel. & Tel. Co. v Pueblo of Santa Ana, 472 US 237, 249, 86 L Ed 2d 475, 105 S Ct 2109 (1985); United States v Menasche, 348 US 528, 538-539, 99 L Ed 615, 75 S Ct 513 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute,' Montclair v Ramsdell, 107 US 147, 152 [27 L Ed 431, 2 S Ct 391], rather than to emasculate an entire section").

[23] See 718 F2d 1291, 1296 (1983) (quoting Bureau of Indian Affairs official's assurance that " 'any claim the Catawbas had against the State would not be jeopardized by carrying out a program with the Federal Government' ").

before and immediately after the effective date of the Act, but that the Tribe thereafter had an obligation to proceed to assert its claim in a timely manner as would any other person or citizen within the State's jurisdiction. As a result, unlike the Court of Appeals, we perceive no contradiction between the applicability of the state statute of limitations and the assurance that the status of any state claims would not be affected by the Act.

We thus conclude that the explicit redefinition of the federal relationship reflected in the clear language of the Catawba Act requires the application of the state statute of limitations to the Tribe's claim.

III

The District Court held that respondent's claim is barred by the South Carolina statute of limitations. The Court of Appeals' construction of the 1959 federal statute made it unnecessary for that court to review the District Court's interpretation of state law. Because the Court of Appeals is in a better position to evaluate such an issue of state law than we are,[24] we remand the case to that court for consideration of this issue.

It is so ordered.

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[24] See Pembaur v Cincinnati, 475 US 469, 484-485, n 13, 89 L Ed 2d 452, 106 S Ct 1292 (1986); Regents of University of Michigan v Ewing, 474 US 214, 224, n 10, 88 L Ed 2d 523, 106 S Ct 507 (1985); Bishop v Wood, 426 US 341, 345-347, 48 L Ed 2d 684, 96 S Ct 2074 (1976); Propper v Clark, 337 US 472, 486-487, 93 L Ed 1480, 69 S Ct 1333 (1949).

SEPARATE OPINION

Justice **Blackmun**, with whom Justice **Marshall** and Justice **O'Connor** join, dissenting.

The Catawba Indian Tribe Division of Assets Act, 73 Stat 592, 25 USC § 931 et seq. [25 USCS §§ 931 et seq.], was passed by Congress in 1959 to divide up the Tribe's federally supervised reservation so that individual Catawbas could sell or mortgage their allotments. The Court today concludes that the Act also had the incidental effect of applying a South Carolina statute of limitations to the Catawbas' pre-existing and longstanding claim to lands the State purported to purchase from the Tribe in 1840. I feel this interpretation cannot be reconciled with the language of the Act under this Court's traditional approach to statutes regulating Indian affairs. I therefore dissent.

I

Too often we neglect the past. Even more than other domains of law, "the intricacies and peculiarities of Indian law deman[d] an appreciation of history." Frankfurter, Foreward to A Jurisprudential Symposium in Memory of Felix S. Cohen, 9 Rutgers L Rev 355, 356 (1954).

Before the arrival of white settlers, the Catawba Indians occupied much of what is now North and South Carolina. In the 1760 Treaty of Pine Tree Hill, the Catawbas relinquished the bulk of their aboriginal territory to Great Britain in exchange for assurances that they would be allowed to live in peace on a small portion of that

territory, a square of land 15 miles on each side (144,000 acres), which today surrounds and includes Rock Hill, S. C. Three years later, in the Treaty of Augusta, the Tribe again agreed to "remain satisfied with the Tract of Land of Fifteen Miles square," and the British once more promised that "the Catawba shall not in any respect be molested by any of the King's subjects within the said Lines." App 35. It is the 144,000 acres reserved for the Catawbas in 1760 and again in 1763 – "a mere token of the[ir] once large domain" – that give rise to this litigation. See J. Brown, The Catawba Indians 8 (1966) (Brown).

The historical record suggests that the Catawbas were driven to the agreements of 1760 and 1763 in large part by the colonists' repeated and continuing encroachments on tribal lands.[1] Some of the land was acquired by purchase, see, e.g., id., at 165, but in South Carolina, as elsewhere, "[f]rom the very beginning abuses marred the transfer of land titles from the Indians to individuals among the English colonists." F. Prucha, American Indian

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[1] In letters written in 1754 to the Catawbas and to the President of the Council of North Carolina, Governor Glen of South Carolina noted that the Catawbas repeatedly had complained about whites' settling too close to them. 6 Record, Exs 1 and 2. In response to these complaints, Governor Glen forbade whites to settle within 30 miles of Catawba towns, ibid., but that prohibition was frequently ignored. See C. Hudson, The Catawba Nation 49 (1970). For general discussions of early colonial encroachments on Catawba land, see Brown, at 163-166; P. Dammann, D. Miller, & D. Israel, A History of the Catawba Tribe and its Reservation Lands, reprinted in Settlement of the Catawba Indian Land Claims, Hearing before the House Committee on Interior and Insular Affairs on HR 3274, 96th Cong, 1st Sess, 135, 151-153 (1979) (Hearing).

Policy in the Formative Years 6 (1962). Indeed, the South Carolina Provincial Council took legislative notice in a 1739 statute that lands purchased from Indians were "generally obtained . . . by unfair representations, fraud and circumvention, or by making them gifts or presents of little value, by which practices, great resentments and animosities have been created amongst the Indians toward the inhabitants of this Province." An Act to restrain and prevent the purchasing Lands from Indians, 1 The First Laws of the State of South Carolina 160-161 (J. Cushing ed 1981). The 1739 statute therefore barred the private acquisition of Indian lands without a grant or license from the Crown or the Governor, but such steps apparently did little to stop white encroachments on Indian territory. See Clinton & Hotopp, Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 U Maine L Rev 17, 21 (1979). Recognizing that "great frauds and abuses have been committed in the purchasing lands of the Indians," the Crown in October 1763 – shortly before the signing of the Treaty of Augusta – flatly forbade any further private purchases of land reserved for Indian tribes. Proclamation of 1763, reprinted in 3 W. Washburn, The American Indian and the United States 2135, 2138 (1973).

The United States from an early date followed a similar policy. Since 1790, the Nonintercourse Act, now codified as reenacted and amended at 25 USC § 177 [25 USCS § 177], has broadly prohibited the sale of Indian land without the consent of the Federal Government. Despite this prohibition – which in 1793 was extended to include not only outright purchases but also acquisitions

of any "claim" to protected lands, see Act of Mar. 1, 1793, § 8, 1 Stat 330 – mounting pressures from settlers in the early 19th century led the State of South Carolina to enact a series of statutes purporting to authorize the leasing of Catawba lands to non-Indians. Initially, the leases signed under these statutes seem to have posed little threat to the Tribe. According to B. S. Massey, who knew the Catawbas during this time and later served as South Carolina's agent to the Tribe, "[t]hey were then strong and felt themselves in their own greatness, governed by their own laws, working the best spots of their lands and leasing out the poorer portions to the white men." Report to The Governor of South Carolina on the Catawba Indians 4 (1854), reprinted in 6 Record, Ex 11.

By the 1830's, however, nearly all of the 144,000 acres reserved for the Tribe in the Treaty of Augusta had been leased to non-Indians. This situation proved disastrous, because rents were "generally paid in old horses, old cows or bed quilts and clothes, at prices that the whites set on the articles taken." Ibid. The Catawbas soon were reduced to "a state of starvation and distress," ibid., and they ultimately gave in to repeated efforts by the State to purchase their land. In 1840, representatives of the Tribe and the State signed the Treaty of Nation Ford. Under this "treaty" – which the United States never joined or approved – the Catawbas relinquished all their land in exchange for two promises. First, the State promised the sum of $16,000 in a series of resettlement payments. Second, the State pledged that it would purchase a new reservation "of the value of five thousand dollars,"

including 300 acres of "good arable lands fit for cultivation" in a thinly populated area of North or South Carolina satisfactory to the Indians. App 38-39.[2]

The South Carolina Legislature promptly provided for the transfer of title from the State to the lessees of the 144,000 acres, requiring only that the lessees reimburse the State proportionately for its advances to the Tribe. Act of Dec. 18, 1840, § 3, 7 SC Stats 103 (1840). Unfortunately, the State showed less enthusiasm in fulfilling its contractual obligations to the Indians. After allowing the Catawbas to wander homeless and uncompensated for 2½ years, the State reportedly spent $2,000 to buy back 630 agriculturally undesirable acres of the Catawbas' original 18th century treaty lands as a "new" reservation for the Tribe.[3] The State continues to hold these 630 acres for the

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[2] According to Massey, the Indians "were driven to" this agreement "by being surrounded by white men, [who] cheat[ed] them out of their rights, and [by] partaking of the vices of the whites and but few of their virtues." Report to The Governor of South Carolina on the Catawba Indians 5 (1854), reprinted in 6 Record, Ex 11. The "vices" to which Massey referred may have included the consumption of alcohol; the Catawbas later charged that state representatives negotiated the treaty by setting out a whiskey barrel and tin cups and inviting the Indians to help themselves. This charge was reported to the Department of the Interior in a 1908 memorandum by Catawba tribal attorney Chester Howe. See Plaintiffs' Response to Defendants' Motion to Dismiss in No. 80-2050-6 (CA4) p 23, n 30, citing Record Group 75, National Archives Central Files 1907-1939, BIA File No. 1753-1906.

[3] See Brown, at 317, 320-322. Assuming this account is correct, the new reservation was less than one-half of one percent of the Tribe's 1763 treaty lands. The price paid by the State for the new reservation – which works out to roughly $3.17

Catawbas. It is unclear from the record before us whether the Tribe ever received the resettlement payments promised by the State.

In the 146 years that have passed since the Nation Ford agreement, the Catawbas repeatedly have pressed their claim to the 144,000 acres, which they feel were taken from them illegally. In the early 1900's, the Tribe petitioned both the Federal Government and the State of South Carolina for relief, arguing that the 1840 transfer was void because the United States had not approved it. The Commissioner of Indian Affairs advised the Catawbas in 1906 and again in 1909 that the Department of the Interior would not seek relief on their behalf. He explained that the Catawbas were "state Indians" for whom the United States had no responsibility, and, consequently, that the absence of federal participation in the Treaty of Nation Ford did not void the transaction.[4] In 1908, the South Carolina Attorney General reached the same conclusion, and advised the state legislature that

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per acre – contrasts strikingly with the price paid for the same land when purchased from the Indians 2½ years earlier – the approximate equivalent of 15 cents per acre payable in installments over 10 years.

[4] 6 Record, Exs 18, 20. But see United States v Candelaria, 271 US 432, 442, 70 L Ed 1023, 46 S Ct 561 (1926) (construing the term "Indian Tribe" in the Nonintercourse Act to refer to any " 'body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory,' " quoting Montoya v United States, 180 US 261, 266, 45 L Ed 521, 21 S Ct 358 (1901); Joint Tribal Council of Passamaquoddy Tribe v Morton, 528 F2d 370, 376-378 (CA1 1975) (applying Nonintercourse Act to Tribe lacking federal recognition.)

the Tribe had no outstanding claim to any of the 144,000 acres. 1908 Op SC Atty Gen 17, 18, 29-32. The Tribe nonetheless continued to press its claim to the land. A federal Indian agent visiting the Catawbas in December 1910, for example, was asked about the Tribe's prospects for recovering "their old reservation of 15 miles square"; he told them the Department of the Interior would not take their case into court. 6 Record, Ex 21, pp 11-12 (letter from C. Davis to Comm'r of Indian Affairs, Jan. 5, 1911).

The seeds of the legislation found dispositive by the Court today were planted in 1943, when the Tribe, the State of South Carolina, and the Department of the Interior concluded a Memorandum of Understanding providing for a new reservation for the Catawbas, and placing the Tribe and the new reservation under federal supervision. Evidently concerned about the Tribe's continued grievances concerning the 1840 agreement, South Carolina sought, unsuccessfully, to include in the Memorandum a waiver of any outstanding claims the Catawbas had against the State. Id., Ex 48 (letter from Ass't Comm'r of Indian Affairs to SC State Auditor, Aug. 28, 1941). Preliminary drafts of the Memorandum included such a waiver, see id., Ex 49, p 5, but federal officials ultimately dropped the provision because they doubted the legality of using the agreement to deprive the Indians of claims that otherwise might be enforceable in court, see App 43-44 (memorandum from Interior Dept. Solicitor to Comm'r of Indian Affairs, Jan. 13, 1942).

In 1958, after representatives from the Bureau of Indian Affairs suggested to the Catawbas that their financial difficulties could be alleviated by distributing the Tribe's federally supervised assets and ending federal

restrictions on alienation, the Indians expressed concern about their claims against the State, but they were assured that the proposal would not jeopardize those claims. 6 Record, Ex 53, pp 7-8 (memorandum from program officer to Tribal Programs Branch Chief, Jan. 30, 1959) (quoted by the Court, ante, at 510, n 23, 90 L Ed 2d, at 501). The Tribe then adopted a resolution calling on its Congressman, Robert Hemphill, to introduce and secure passage of legislation to remove restraints on alienation and to distribute tribal assets; the resolution specifically requested, however, that "nothing in this legislation shall affect the status of any claim against the State of South Carolina by the Catawba Tribe." App 103.

Representative Hemphill asked the Bureau of Indian Affairs to draft legislation "to accomplish the desires set forth in the Resolution." Id., at 50. He then presented the draft bill to the Catawbas and told them that it had been "drawn up to carry out the intent of the resolution." Id., at 111. After a majority of the Tribe expressed approval, Representative Hemphill introduced the bill in Congress, explaining that the Tribe had given its consent. See 105 Cong Rec 5462 (1959). The result was the 1959 Division of Assets Act, which the Court today concludes may bar the Tribe from pursuing its claim to the lands reserved for it in 1760 and 1763.

In the 1970's, spurred by favorable legal rulings elsewhere in the country, Catawba leaders renewed their request to the Department of the Interior to seek relief for the Tribe. In 1977, the Solicitor of the Department concluded that the rebuffs given the Catawbas in 1906 and 1909 had been legally unjustified, and that the Tribe could establish a prima facie claim to the 144,000 acres. He

further concluded that the Division of Assets Act operated prospectively only, and did not affect pre-existing rights. Accordingly, the Solicitor formally requested the Department of Justice to institute legal action on behalf of the Catawbas and to support the settlement discussion that the Tribe already had initiated with South Carolina officials. See App to Brief in Opposition 3a. The litigation request was later withdrawn in an effort to emphasize that the Interior Department favored a negotiated settlement if at all possible, and settlement legislation backed by the Tribe was introduced in Congress. See Hearing, at 15-17 (Hearing) (statement of Leo M. Krulitz, Solicitor of the Department of the Interior). The legislative efforts apparently proved fruitless, and in October 1980 the Tribe filed this suit.

II

The Tribe's complaint asserts a right to possession of the reserved portion of its aboriginal territory under the Nonintercourse Act, the Federal Constitution, and the treaties of 1760 and 1763.[5] These are federal claims, see Oneida Indian Nation v County of Oneida, 414 US 661,

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[5] Although the complaint asks in part that the Tribe "be restored to immediate possession" of virtually the entire 144,000 acres, App 25, the available remedies, even if the Tribe prevailed, well might be limited by equitable considerations. See Yankton Sioux Tribe v United States, 272 US 351, 357, 71 L Ed 294, 47 S Ct 142 (1926). The question currently before the Court, of course, is not whether part or all of the land claimed by the Catawbas should be given back to them, but whether the Tribe's ability to seek any judicial relief at all is governed by South Carolina's statute of limitations.

666-678, 39 L Ed 2d 73, 94 S Ct 772 (1974) (Oneida I), and the statute of limitations is thus a matter of federal law, see County of Oneida v Oneida Indian Nation, 470 US 226, 240-244, 84 L Ed 2d 169, 105 S Ct 1245 (1985) (Oneida II). Where, as here, Congress has not specified a statute of limitations, federal courts generally borrow the most closely analogous limitations period under state law, but *only* if application of the state limitations period would not frustrate federal policy. See, e.g., Wilson v Garcia, 471 US 261, 266-267, 85 L Ed 2d 254, 105 S Ct 1938 (1985); DelCostello v Teamsters, 462 US 151, 158-163, 76 L Ed 2d 476, 103 S Ct 2281 (1983); Occidental Life Ins. Co. v EEOC, 432 US 355, 367, 53 L Ed 2d 402, 97 S Ct 2447 (1977).

In Oneida II, the Court recognized that application of state statutes of limitations to Indian land claims generally *would* violate federal policy. The Court noted that a 1950 federal statute giving New York courts jurisdiction over most civil disputes involving Indians had been carefully crafted to exempt pre-existing land claims from the operation of a New York statute of limitations. See Act of Sept. 13, 1950, 64 Stat 845, 25 USC § 233 [25 USCS § 233]. Furthermore, in a later series of more general enactments imposing a federal statute of limitations on certain tort and contract actions brought anywhere in the United States by Indians or by the United States on behalf of Indians, Congress specifically excluded from the limitations period all actions "to establish the title to, or right of possession of, real or personal property." 28 USC § 2415(c) [28 USCS § 2415(c)].[6] The Court in Oneida II

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[6] The federal statute of limitations for certain tort and contract actions brought by the United States on behalf of Indian

concluded that the text and legislative history of these statutes evinced a congressional belief that actions brought to enforce Indian property rights were not, and should not be, subject to filing deadlines other than those

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Tribes was first adopted in 1966; the limitations period was not applied to suits brought by Indians themselves until 1982. "In 1972 and again in 1977, 1980, and 1982, as the statute of limitations was about to expire for pre-1966 claims, Congress extended the time within which the United States could bring suits on behalf of the Indians." Oneida II, 470 US, at 242, 84 L Ed 2d 169, 105 S Ct 1245. The debates over these amendments to § 2415 indicate that Congress extended the filing deadline in part to allow additional time for preparation and negotiation of tort claims for trespass damages arising from allegedly illegal expropriations of tribal lands – including the 144,000 acres claimed by the Catawbas. See, e.g., 123 Cong Rec 22166-22167 (1977) (Rep. Cohen, discussing Catawba claim and others); id., at 22168 (Rep. Walsh); id., at 22170 (Rep. Hanley); 126 Cong Rec 5748-5749 (1980) (Rep. Holland, discussing Catawba claim); id., at 5750 (Rep. Udall). Members of Congress emphasized repeatedly that Indian land claims were difficult to research, that Indians historically had lacked adequate legal assistance and administrative resources, and that the United States had not played its proper role in bringing suits on the Indians' behalf. See, e.g., 123 Cong Rec 22170 (1977) (Rep. Collins); id., at 22171 (Rep. Johnson); 126 Cong Rec 3289 (1980) (Sen. Cranston); id., at 5745-5746 (Rep. Clausen); id., at 5747 (Rep. Danielson); id., at 5750 (Rep. Swift). See also 123 Cong Rec 22171 (1977) (Rep. Weiss) ("[A]s a result of the numerous injustices suffered by American Indians during the last 150 years – many at the hands of the American Government – it is incumbent on the United States to give these people – our country's first inhabitants – a full chance to redress their grievances"); 126 Cong Rec 3287 (1980) (Sen. Melcher) (failure to extend statute of limitations could lead to "mass injustices"). Similar considerations presumably motivated Congress' decision to exempt entirely all claims for title or possession from the limitations period prescribed in § 2415.

provided by federal statute. Borrowing a state statute of limitations in such a case "would be a violation of Congress' will." 470 US, at 244, 84 L Ed 2d 169, 105 S Ct 1245.

In determining whether the 1959 Division of Assets Act exempts the Catawbas' claim from this general principle, analysis must begin with the firmly established rule – which the Court today implicitly reaffirms, see ante, at 506, 90 L Ed 2d, at 498-499 – that ambiguities in statutes regulating Indian affairs are to be construed in the Indians' favor. See, e.g., Oneida II, 470 US, at 247-248, 84 L Ed 2d 169, 105 S Ct 1245; Bryan v Itasca County, 426 US 373, 392, 48 L Ed 2d 710, 96 S Ct 2102 (1976); Northern Cheyenne Tribe v Hollowbreast, 425 US 649, 655, n 7, 48 L Ed 2d 274, 96 S Ct 1793 (1976); DeCoteau v District County Court, 420 US 425, 444, 43 L Ed 2d 300, 95 S Ct 1082 (1975); United States v Santa Fe Pacific R. Co. 314 US 339, 353-354, 86 L Ed 260, 62 S Ct 248 (1941); Alaska Pacific Fisheries v United States, 248 US 78, 89, 63 L Ed 138, 39 S Ct 40 (1918); Choate v Trapp, 224 US 665, 675, 56 L Ed 941, 32 S Ct 565 (1912); see generally F. Cohen, Handbook of Federal Indian Law 221-225 (1982). This rule is not simply a method of breaking ties; it reflects an altogether proper reluctance by the judiciary to assume that Congress has chosen further to disadvantage a people whom our Nation long ago reduced to a state of dependency. The rule is particularly appropriate when the statute in question was passed primarily for the benefit of the Indians, as was the 1959 Division of Assets Act. Absent "clear and plain" language to the contrary, Santa Fe Pacific, 314 US, at 353, 86 L Ed 260, 62 S Ct 248, it must be assumed that Congress did not intend to belie its "avowed solicitude" for the Indians, id., at 354, 86 L Ed

260, 62 S Ct 248, with a "backhanded" abrogation or limitation of their rights, Menominee Tribe v United States, 391 US 404, 412, 20 L Ed 2d 697, 88 S Ct 1705 (1968).

The Court today evidently finds in § 5 of the Division of Assets Act "the clearly expressed intent of Congress," ante, at 506, 90 L Ed 2d, at 498, that the Catawbas' tribal land claim was to be subject to South Carolina's statute of limitations. The Court relies largely on two provisions of § 5. The first renders inapplicable to the Catawbas all "special services performed by the United States for Indians because of their status as Indians," and "all statutes of the United States that affect Indians because of their status as Indians." The second provides that state laws shall "apply to [the Catawbas] in the same manner they apply to other persons or citizens." 25 USC § 935 [25 USCS § 935]. Neither of these provisions, in my view, is able to bear the weight the Court places upon it.

A

The first provision merely renders federal Indian "services" and "statutes" inapplicable to the Catawbas. I agree with the Court that this provision makes the Nonintercourse Act, along with other Indian statutes, inapplicable both to individual Catawbas and to the Tribe. See ante, at 505-509, 90 L Ed 2d, at 498-500. But that simply means that after the Division of Assets Act went into effect, the Tribe no longer was statutorily barred from selling or leasing its land. The services-and-statutes clause of the Act does not expressly abrogate or place procedural conditions on any *pre-existing* claims the

Catawbas may have had, and the broad federal policy against application of state statutes of limitations to Indian land claims is neither a "service" nor a "statute."

The majority nonetheless asserts that this Court has "long recognized that, when Congress removes restraints on alienation by Indians, state laws are fully applicable to subsequent claims." Ante, at 508, 90 L Ed 2d, at 499-500. The cases it cites for that proposition all were decided well before the emergence during the past 35 years of a clear congressional policy against the application of state statutes of limitations to Indian land claims. See Oneida II, 470 US, at 240-244, 84 L Ed 2d 169, 105 S Ct 1245. More importantly, all the cases cited by the majority involve lands for which patents had been issued to individual Indians, not lands alleged to remain tribal property. This Court made clear in Oneida I that claims arising under such patents are not federal claims at all, because, "[o]nce patent issues, the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts." 414 US, at 676, 39 L Ed 2d 73, 94 S Ct 772. In this case, however, as in Oneida I, "the assertion of a federal controversy does not rest solely on the claim of a right to possession derived from a federal grant of title whose scope will be governed by state law. Rather, it rests on the substantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory right to tribal lands, wholly apart from the application of state law principles which normally and separately protect a valid right of possession." 414 US, at 677, 39 L Ed 2d 73, 94 S Ct 772. Here, as in Oneida I, the complaint thus "asserts a

present right to possession under federal law." Id., at 675, 39 L Ed 2d 73, 94 S Ct 772.

I do not see how a statute removing restraints on alienation can fairly be said to signal unambiguously a congressional intent to subject pre-existing tribal land claims arising under federal law to state statutes of limitations. But even if I agreed with the majority that the removal of restraints on alienation should trigger the application of state limitations periods, the 1959 Act lifted only *statutory* restrictions on the alienation of Catawba land, and the requirement that the Federal Government approve any transfer of the property at issue in this case did not, and does not, stem solely from any federal statute. The land set aside for the Catawbas in 1760 and 1763 was within the Tribe's aboriginal territory,[7] and their claim to the land thus derives from original title[8] as well as from the 18th-century treaties.[9] With respect to original

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[7] John Stuart, the King's Superintendent of Indian Affairs, who had negotiated the Treaty of Augusta, noted in a 1772 letter to the South Carolina Governor that the 144,000 acres reserved for the Catawbas in that treaty were, "as well as a very considerable Extent of Country besides[,] possessed by them when the Subjects of England first Settled in this part of the World." 6 Record, Ex 7, p 1.

[8] See generally F. Cohen, Handbook of Federal Indian Law 486-493 (1982); Cohen, Original Indian Title, 32 Minn L Rev 28 (1947); Note, Indian Title: The Rights of American Natives in Lands They Have Occupied Since Time Immemorial, 75 Colum L Rev 655 (1975).

[9] This Court long has respected grants of land to Indian tribes by prior governments. See, e.g., United States v Title Insurance & Trust Co. 265 US 472, 484, 68 L Ed 1110, 44 S Ct 621 (1924), quoting Barker v Harvey, 181 US 481, 491-492, 45 L Ed

title, at least, the Nonintercourse Act merely " 'put in statutory form what was or came to be the accepted rule – that the extinguishment of Indian title required the consent of the United States.' " Oneida II, 470 US, at 240, 84 L Ed 2d 169, 105 S Ct 1245, quoting Oneida I, 414 US, at 678, 39 L Ed 2d 73, 94 S Ct 772.[10]

There is nothing in the 1959 legislation that indicates that Congress intended to exempt the Catawbas from this common-law protection of undistributed tribal property as well as from its statutory codification. Nor is there

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963, 21 S Ct 690 (1901) (" 'There is an essential difference between the power of the United States over lands to which it has had full title, and of which it has given to an Indian tribe a temporary occupancy, and that over lands which were subjected by the action of some prior government to a right of permanent occupancy, for in the latter case the right, which is one of private property, antecedes and is superior to the title of this government, and limits necessarily its powers of disposal' "); Mitchel v United States, 9 Pet 711, 9 L Ed 283 (1835).

[10] The federal common-law rule against alienation of aboriginal title without the consent of the sovereign was recognized as early as 1823 in Chief Justice Marshall's opinion for the Court in Johnson v McIntosh, 8 Wheat 543, 573-574, 5 L Ed 681 (1823), and it is reflected in the Constitution's Indian Commerce Clause, Art I, § 8, cl 3, which made "Indian relations . . . the exclusive province of federal law," Oneida II, 470 US, at 234, and n 4, 84 L Ed 2d 169, 105 S Ct 1245. See Clinton & Hotopp, Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 U Main L Rev 17, 28-29 (1979). In Oneida II, the Court rejected a suggestion that Indian common-law rights to tribal lands were somehow swallowed up or pre-empted by the Nonintercourse Act; it made clear that the common law still furnishes an independent basis for legal relief. See 470 US, at 236-240, 84 L Ed 2d 169, 105 S Ct 1245.

anything to indicate that Congress meant to abrogate the protection promised to the Tribe under the treaties of 1760 and 1763, which the Tribe claims provide an independent source of continuing federal protection. Indeed, in rejecting an argument that a similar provision of the Menominee Termination Act destroyed treaty rights to hunt and fish, this Court noted: "The use of the word 'statutes' is potent evidence that no *treaty* was in mind." Menominee Tribe, 391 US, at 412, 20 L Ed 2d 697, 88 S Ct 1705 (emphasis in original). In the same way, Congress' use in 1959 of the terms "services" and "statutes" suggests, if anything, that the Division of Assets Act was not intended to remove other sources of protection. Surely the selection of these terms provides no support for the view that Congress meant to impose new procedural requirements on pre-existing tribal land claims based not only on statutory provisions, but also on treaty rights and federal common law.[11]

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[11] The Tribe's complaint requests relief under the treaties of 1760 and 1763, the Nonintercourse Act, the Indian Commerce Clause, Art I, § 8, cl 3, and the constitutional prohibition against state treaties, Art I, § 10, cl 1. App 23. Reading the complaint liberally "so . . . as to do substantial justice," Fed Rule Civ Proc 8(f), I would conclude that the constitutional references suffice to invoke the rule that original Indian title may not be alienated without federal approval. Cf. Brief for United States as Amicus Curiae in Connecticut v Mohegan Tribe, O T 1980, No. 80-1365 [452 US 968, 69 L Ed 2d 981, 101 S Ct 3124], p 7 (describing the rule as "constitutionally based"). A narrower construction of the complaint would be especially inappropriate because the Tribe adopted the United States' brief in Mohegan Tribe as part of its response in the District Court to the defendants' motion to dismiss, making clear that the constitutional claims raised in the complaint were to be read to embrace the common-law rule. See

B

The second provision of the 1959 Act relied on by the Court directs that "the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction." I agree with the Court that the word "them" must be understood to refer not only to individual Catawbas, but also to the Tribe. See ante, at 506-507, 90 L Ed 2d, at 498-499. Clearly, however, "them" does not refer to *claims* brought by the Catawbas; the term encompasses the plaintiff in this case, but not the cause of action.

This distinction is critical. The "laws of the several States" provision of the Division of Assets Act placed the Catawbas on the same footing as non-Indians with regard to the application of state law. Just as a non-Indian's action based on South Carolina law must be brought within the time specified by the State, so a state-law action brought by a Catawba – or by the Catawba Tribe – must meet the same requirement. If a non-Indian in South Carolina brings a *federal* claim, however, the limitations period is determined by federal law. The same must hold

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Plaintiff's Memorandum in Support of Motion for Leave to File Supplemental Memorandum and Supplemental Memorandum, 1 Record, Ex 15.

Because, under my view, the Tribe's treaty claims add nothing material for present purposes to its common-law claim, I would not decide at this time whether the 1760 and 1763 treaties independently required the United States, as successor to Great Britain, to approve any sale or lease of the 144,000 acres. Why the majority finds no need to discuss this question, or the issue of common-law restraints on alienation, is harder to understand.

for the federal claims raised by the Catawbas in this litigation.

Of course, the real question in this case is not whether federal law governs the limitations question, but whether federal law should borrow South Carolina's period of limitations, notwithstanding the general federal policy against such borrowing in the context of Indian land claims. My point here is that this question is not answered by the statutory instruction to apply state law to the Catawbas "in the same manner" as it is applied to non-Indians. Subjecting a group of Indians to state law to the same extent as other citizens is far different from subjecting their unique federal claims to a state statute of limitations. For non-Indians as well as Indians, the decision whether to apply a state limitations period to a federal claim depends on whether such application is deemed contrary to federal policy. And nothing in § 5 of the Division of Assets Act unambiguously directs that, as a matter of federal policy, the Catawbas' unsettled tribal claims should be treated any differently for statute-of-limitations purposes from other tribal land claims. Indeed, there is no indication that Congress thought about such claims at all.[12]

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[12] The Senate and House Reports both explained that the purpose of the 1959 legislation was "to distribute the bulk of the [Catawbas'] tribal assets" among the members of the Tribe. S Rep No. 863, 86th Cong, 1st Sess, 1 (1959); HR Rep No. 910, 86th Cong, 1st Sess, 2 (1959). Each Report contained a list of the Tribe's assets; the list made no mention of the Catawbas' claim to their 18-century treaty lands. See S Rep No. 863, at 3; HR Rep No. 910, at 4.

C

The Court does not rely exclusively on the terms of the two provisions discussed above; it also emphasizes that the Division of Assets Act as a whole represented an "explicit redefinition of the relationship between the Federal Government and the Catawbas," terminating "special federal protection" for the Tribe and its members. Ante, at 508, 90 L Ed 2d, at 499; see also ante, at 510, 90 L Ed 2d, at 501.[13] But if we take seriously the "eminently sound and vital canon" that all ambiguities in statutes passed for the benefit of Indians are to be construed in the Indians' favor, Northern Cheyenne Tribe, 425 US, at 655, n 7, 48 L Ed 2d 274, 96 S Ct 1793, then surely the effect of such an "explicit redefinition" must be limited to its explicit terms. The Court recognized as much in Menominee Tribe, supra, when it refused to read into the Menominee Termination Act an abrogation of the Menominees' treaty rights to hunt and fish. Regardless of the general thinking behind the termination policy of the 1950's, we are faced here with a particular statute, and we should not " 'strain to implement [an assimilationist] policy Congress has now rejected.' " Bryan v Itasca County, 426 US, at 389, n 14, 48 L Ed 2d 710, 96 S Ct 2102, quoting

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[13] The majority rightly places little weight on the fact that § 5 of the 1959 Act revoked the Tribe's Constitution. The Catawbas had no tribal constitution until 1944, when they adopted one pursuant to the 1943 Memorandum of Understanding. See, e.g., HR Rep No. 910, 86th Cong., 1st Sess, 5 (1959). Revocation of the Constitution therefore can hardly be understood as a statement that the Tribe should cease existence or lose any pre-existing claims.

Santa Rosa Band of Indians v Kings County, 532 F2d 655, 663 (CA9 1975).

Such straining is particularly inappropriate in this case, where the statute in question was passed at the Indians' behest, was apparently intended to carry out the Indians' wishes, and received the Indians' support based on federal assurances that it would not "affect the status" of their claim against the State. One, of course, can distinguish formally, as the majority does, see ante, at 510, 90 L Ed 2d, at 501, between preserving the "status" of the claim and preserving the claim's immunity from the state statute of limitations. But the distinction smacks of the kind of semantic trap that this Court consistently has attempted to avoid when construing governmental agreements with Indians and statutes ostensibly passed for the benefit of Indians. In cases involving Indian treaties, for example, it has long been the rule not only that doubtful expressions must be construed in the Indians' favor, but also that the entire treaty must be interpreted as the Indians would have understood it. See, e.g., Choctaw Nation v Oklahoma, 397 US 620, 631, 25 L Ed 2d 615, 90 S Ct 1328 (1970); Jones v Meehan, 175 US 1, 11, 44 L Ed 49, 20 S Ct 1 (1899); Worcester v Georgia, 6 Pet 515, 582, 8 L Ed 483 (1832).

The Catawbas were assured in unqualified terms that the 1959 legislation would not jeopardize their century-old grievance against the State of South Carolina. The Act itself said nothing about the claim, and nothing about statutes of limitations. No one told the Indians or the voting Members of Congress that the statute might some day prevent the Tribe from pursuing its claim in court. The Court nevertheless concludes today that the 1959 Act

bars the Catawbas' claim if the limitations period under South Carolina law expired between the passage of the Act and the initiation of this lawsuit in 1980, and that this interpretation of the statute comports with the promises made to the Catawbas in the 1950's. I cannot agree with either conclusion. In my view, this decision breaks faith once again with the Tribe, and it does so in a way the statute does not require. Nothing in the text or legislative history of the Act evinces a congressional desire to mislead the Indians, or an understanding that the Act sometime might be construed as it is by the Court today.

III

Apparently, there no longer are any full-blood Catawbas, and no one now speaks the Catawba language. See Charlotte Observer, Mar. 6, 1977, p 1C, reprinted in Hearing at 420. Of the 1,200 or so persons currently on the tribal roll, only about 5 or 10 percent live on the 630-acre reservation still held for the Tribe by the State of South Carolina.[14] The reservation itself does not differ conspicuously from other rural neighborhoods in South Carolina. Indeed, "[a]n unobservant tourist may well drive through the reservation unawares, and many do." C. Hudson, The Catawba Nation 3 (1970). For the most part, modern-day Catawbas "think and live like ordinary Americans of the Southeast." Ibid.

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[14] See, e.g., Hearing, at 20 (statement of Leo M. Krulitz, Interior Department Solicitor); id., at 39 (statement of Claude Ayres, Member, Catawba Indian Nation Land Claim Committee); Proposed Catawba Indian Reservation Land Use Analysis 4 (1977), reprinted in Hearing, at 251, 258.

When an Indian Tribe has been assimilated and dispersed to this extent – and when, as the majority points out, thousands of people now claim interests in the Tribe's ancestral homeland, see ante, at 499-500, 90 L Ed 2d, at 494-495, and n 4 – the Tribe's claim to that land may seem ethereal, and the manner of the Tribe's dispossession may seem of no more than historical interest. But the demands of justice do not cease simply because a wronged people grow less distinctive, or because the rights of innocent third parties must be taken into account in fashioning a remedy. Today's decision seriously handicaps the Catawbas' effort to obtain even partial redress for the illegal expropriation of lands twice pledged to them, and it does so by attributing to Congress, in effect, an unarticulated intent to trick the Indians a century after the property changed hands. From any perspective, there is little to be proud of here.

Because I do not believe that Congress in 1959 expressed an unambiguous desire to encumber the Catawbas' claim to their 18th-century treaty lands, and because I agree with Justice Black that "[g]reat nations, like great men, should keep their word," FPC v Tuscarora Indian Nation, 362 US 99, 142, 4 L Ed 2d 584, 80 S Ct 543 (1960) (dissenting opinion), I do not join the judgment of the Court.